[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER,

vs.

J. RAYMOND McCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

Equity No. 54276

SANTOS MIGUEL, Plaintiff,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, U. S. Army, Defendants

BILL OF COMPLAINT FOR INJUNCTION—Filed April 27, 1932

The plaintiff, Santos Miguel, respectfully represents to the court:

1. That he is a citizen of the Philippine Islands, a national of the United States, and resides in the Philippine Islands.

The defendant, J. Raymond McCarl, is Comptroller General of the United States, and resides in the District of Columbia.

The defendant, Frederick W. Coleman, is Chief of Finance, United States Army, and resides in the District of Columbia.

2. The plaintiff enlisted in the Army of the United States October 1, 1901; and from said date served continuously as an enlisted man in the Philippine Scouts, which organization is a component part of the Army, until October 31, 1931, on which date he, having duly made application to the President, was, by direction of the President, placed upon the retired list with the rank of master sergeant, after 30 years' service, pursuant to paragraph 35, Special Orders No. 207, of the War Department dated September 3, 1931, reading as follows:

"35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired [fol. 2] list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel di-

rected is necessary in the military service. QM 1600 A 211-2. (A. G. 220.85.) (4-3-21.)

"By order of the Secretary of War.

"Douglas MacArthur, General, Chief of Staff."

The application made by the plaintiff to the President to be placed upon the retired list, and the order of the Secretary of War acting for the President placing plaintiff upon the retired list, were under and by virtue of the authority contained in the act of March 2, 1907 (34 Stat. 1217), providing—

"That when an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *."

3. Section 36 of the act of February 2, 1901 (31 Stat. 757), authorizing the organization of the Philippine Scouts, provided, inter alia, that—

"The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army."

The above quoted provisions of the act of February 2, 1901, were amended by the act of May 10, 1926, to read as follows:

"The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army * * *."

4. That pursuant to the authority contained in the act above quoted the Secretary of War fixed the retired pay and allowances of enlisted men of the Philippine Scouts, and prescribed the same in Paragraph II, Circular No. 41, dated War Department, September 21, 1931, as follows:

"II—Retired Pay and Allowances of Philippine Scouts.—Under the provisions of the act of February 2,

1901, as amended by the act of May 10, 1926 (44 Stat. 406), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:

1. Pay.—Seventy-five per cent (75%) of the base pay and the longevity pay received by them on the active list at the time of their retirement.

2. Allowances.—

a. Six dollars and thirty-five cents ($6.35) per month in lieu of rations and clothing, and

b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat, and light,
(A. G. 220.85) (4-3-31.)''

5. Subsequent to his retirement as aforesaid plaintiff duly submitted to his disbursing officer, Major S. R. Beard, Finance Department, U. S. Army, for payment by him, a voucher for the retired pay and allowances due plaintiff for the month of November, 1931, computed on the basis fixed in Paragraph II of War Department Circular No. 41, [fol. 3] above-quoted, amounting to $50.81, which voucher consisted of the following items, to-wit:

Pay (75% of active pay)	$40.31
Rations and clothing	6.35
Quarters	4.15
Total	50.81

6. The said disbursing officer, instead of paying said voucher for plaintiff's retired pay and allowances, presumed and proceeded to transmit the said voucher, through the Office of the Chief of Finance, United States Army, to the defendant, J. Raymond McCarl, Comptroller General of the United States, for an advance decision of the Comptroller General as to the legal authority for its payment. Acting upon said request the defendant J. Raymond McCarl, Comptroller General of the United States, on, to-wit, January 10, 1932, addressed a communication to plaintiff's disbursing officer in which he, the defendant J. Raymond McCarl, pretending to act within the functions of his office as Comptroller General and with the purpose, notwithstanding the aforesaid action of the President of the United States and the Secretary of War, of depriving plaintiff of

his rightful military status as a retired enlisted man of the Army as aforesaid, held, and stated in said communication to the said disbursing officer, that "the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and in said communication stated and ruled to said disbursing officer that "You are not authorized to pay the voucher which will be retained in the files of this office," the voucher referred to being the voucher for plaintiff's pay and allowances as a retired enlisted man hereinbefore described. By reason of said "advance decision" or ruling by the defendant, J. Raymond McCarl, the said disbursing officer knowing that his accounts would not be settled and approved and that he would be embarrassed in the settlement of his accounts should he disregard the said letter, thereupon, being thus coerced by the defendant, J. Raymond McCarl, declined to make said payment to plaintiff of his pay and allowances to which he was and is by law entitled as a retired enlisted man of the United States Army, and the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, with like knowledge of the embarrassment to, and coercion of, the said disbursing officer or any other disbursing officer of the Army, should any such officer disregard the said advance decision of the defendant, J. Raymond McCarl, and the defendant, Frederick W. Coleman being himself thus coerced by said decision, has also declined to order payment to plaintiff of his said pay and allowances as a retired enlisted man of the Army.

7. The plaintiff avers that Congress has appropriated funds for the payment of the pay and allowances of retired enlisted men of the Army and that said funds are now available for payment and will be paid to plaintiff when the unlawful interference of the defendant, J. Raymond McCarl, ceases; that he has served honestly and faithfully for thirty years in the Army under the officers of the Army of the United States and that he has at all times been advised and he has believed that upon completion of the requisite thirty years' service he would be entitled to retirement [fol. 4] under the statute; that, although he was placed upon the retired list by the President with the prescribed pay and allowances as aforesaid, he is, by reason of the aforesaid unlawful interference of the defendant, J. Raymond McCarl, deprived at his advanced age of his military

status as a retired enlisted man of the United States Army and of all retired pay and allowances; that he is advised and believes, and therefore avers, that a considerable number of enlisted men of the Philippine Scouts have completed, or are about to complete, the thirty years' service in the Army requisite to retirement and are, or soon will be, in a situation similar to his, and that the said unlawful interference of defendant, J. Raymond McCarl, has resulted and is resulting in irreparable injury to the plaintiff and so affects the important component of the Army to which plaintiff belongs as to do injury to the morale of said component of the Army and to embarass military administration.

8. Plaintiff is advised and believes, and therefore avers, that the defendant J. Raymond McCarl, Comptroller General of the United States, is without authority to question or determine the legality of the retirement of plaintiff as an enlisted man of the Philippine Scouts, or to annul the action of the Secretary of War taken for the Chief Executive and Commander in Chief of the Army in so retiring him and fixing the pay and allowances to which he is entitled; that, the Secretary of War, acting within the scope of his lawful authority, having retired plaintiff and having fixed the retired pay and allowances to which he is entitled, plaintiff, upon his retirement as hereinbefore set out, became and now is entitled to receive and to continue to receive the retired pay and allowances as they are now or may hereafter be fixed; that it is the duty of the defendant, Frederck W. Coleman, Chief of Finance, U. S. Army, to pay or to cause to be paid to plaintiff his retired pay and allowances as a retired enlisted man of the Philippine Scouts for the month of November, 1931, and subsequent months and to continue to pay or cause to be paid to him his retired pay and allowances as and when the same become due and payable, notwithstanding the aforesaid decision or ruling by the defendant, J. Raymond McCarl, Comptroller General of the United States; and that the failure, omission, and refusal to pay him such retired pay and allowances is an unlawful invasion of the rights of the plaintiff resulting in irreparable injury to him against which he has no adequate and complete remedy save and except in a court of equity.

Wherefore, the premises considered, the plaintiff prays as follows:

1. That the process of this court issue to the defendants requiring them to appear and answer this bill.

2. That the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined pendente lite and permanently upon the final hearing of this cause from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, or with any finance or disbursing officer of the United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defend- [fol. 5] ant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant.

3. That the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, be enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months, and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men. And for such other, further or different relief as to the court may seem just and proper.

Santos Miguel, Plaintiff, by George M. Wilmeth, Attorney for Plaintiff. Samuel T. Ansell, Burr Tracy Ansell, George M. Wilmeth, Counsel for Plaintiff.

Duly sworn to by George M. Wilmeth. Jurat omitted in printing.

In Supreme Court of District of Columbia

Rule to Show Cause—Filed April 27, 1932

* * * * * * *

Upon consideration of the bill for injunction filed herein on the 27th day of April, 1932, it is by the court this 27th day of April, 1932,

Ordered, that the defendants, J. Raymond McCarl, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, United States Army, appear in this court on the 4th day of May, 1932, at the hour of ten o'clock, a. m., and show cause, if any they may have, why they should not be enjoined and commanded pendente lite as prayed in said bill.

Provided, that a copy of this rule be served upon said defendants at least two clear days before the return day herein above fixed.

By the Court: Jesse C. Adkins, Justice.

[fol. 6] MARSHAL'S RETURN

Served a copy of the within rule on J. Raymond McCarl, Comptroller General of United States, by serving Reed F. Martin chief clerk 4-28-32 personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by James S. McCarthy, Deputy U. S. Marshal. B.

Served a copy of the within rule on Frederick W. Coleman, Chief of Finance, U. S. Army, 4-28-32 personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by C. G. Cowley, Deputy U. S. Marshal. B.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION OF J. RAYMOND MCCARL TO DISMISS BILL OF COMPLAINT, &C.—Filed May 4, 1932

* * * * * * *

Now comes the defendant, J. Raymond McCarl, Comptroller General of the United States, by his attorneys, and moves the court to dismiss the bill of complaint filed herein and for grounds thereof states as follows:

1. The bill of complaint is without equity.

2. The bill of complaint shows on its face that the proceeding is one to recover salary, pay, or emoluments as a retired officer or enlisted man of the Philippine Scouts, which salary, pay, or emoluments as claimed, the defendant, Comptroller General of the United States, has held in a

formal decision rendered on application made under paragraph 3 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended (U. S. C. 31:74), is not authorized by law to be paid to the plaintiff, and, therefore, the proceeding is not a matter entitling the plaintiff to injunctive relief.

3. The bill of complaint shows on its face that the proceeding is in reality one against the United States by the plaintiff for salary, pay, or emoluments alleged to be due him as a retired officer or enlisted man, and the bill of complaint entirely fails to show on its face that there has been obtained the consent of the United States to be sued for such salary, pay, or emoluments in injunction proceedings against its duly constituted officers.

4. To grant the writ of injunctive relief prayed for herein would have the effect of enforcing a claim against the United States without the United States being a party to the proceeding and without its consent.

5. The bill of complaint shows on its face that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims, under section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

[fol. 7] 6. The identical claim of the plaintiff now is pending before the Court of Claims under departmental reference No. 169, having been referred to that court by letter dated February 15, 1932, of the Secretary of War, requesting a review by that court of a decision rendered by the Comptroller General, January 19, 1932, on the merits of the plaintiff's claim.

7. The bill of complaint shows on its face that it has for its object the establishment of a legal right against the United States by compelling the defendant, Comptroller General of the United States, to exercise his judgment and discretion respecting his official duties in the particular way desired by the plaintiff.

8. The facts stated in the bill of complaint, if true, present no matter entitling the plaintiff to relief by injunction.

Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney; R. L. Golze, General Counsel; Harrell O. Hoagland, Principal Attorney, Attorneys for the Defendant.

MEMORANDUM

May 4, 1932.—Notice of above motion, and acknowledgment of service, filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION OF FREDERICK W. COLEMAN TO DISMISS BILL OF COMPLAINT, &c.—Filed May 13, 1932

* * * * * * * *

Now comes the defendant, Frederick W. Coleman, Chief of Finance, United States Army, by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, and moves the court to dismiss the bill of complaint filed herein, and for grounds thereof states as follows:

1. The bill of complaint is without equity.

2. The bill of complaint shows on its face that the proceeding is one to recover salary, pay, or emoluments as a retired officer or enlisted man of the Philippine Scouts, which salary, pay, or emoluments as claimed, the defendant, Comptroller General of the United States, has held in a formal decision rendered on application made under paragraph 3 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended (U. S. C. 31:74), is not authorized by law to be paid to the plaintiff, and, therefore, the proceeding is not a matter entitling the plaintiff to injunctive relief.

3. The bill of complaint shows on its face that the proceeding is in reality one against the United States by the plaintiff for salary, pay, or emoluments alleged to be due him as a retired officer or enlisted man, and the bill of complaint entirely fails to show on its face that there has been [fol. 8] obtained the consent of the United States to be sued for such salary, pay, or emoluments in injunction proceedings against its duly constituted officers.

4. To grant the writ of injunctive relief prayed for herein would have the effect of enforcing a claim against the United States without the United States being a party to the proceeding and without its consent.

5. The bill of complaint shows on its face that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims, under Section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

6. The identical claim of the plaintiff now is pending before the Court of Claims under departmental reference No. 169 (having been referred to that court by letter dated February 15, 1932, of the Secretary of War, requesting a review by that court of a decision rendered by the Comptroller General, January 19, 1932, on the merits of the plaintiff's claim.

7. The facts stated in the bill of complaint, if true, present no matter entitling the plaintiff to relief by injunction.

Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney.

MEMORANDUM

May 13, 1932.—Notice of above motion, and acknowledgment of service, filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OPINION—Filed June 10, 1932

* * * * * * *

Plaintiff, after serving thirty years in the Philippine Scouts, was by order of the President placed upon the retired list of the Army with the rank of master sergeant. Upon the request of the proper disbursing officer for decision whether he was authorized to make payment to plaintiff of his retired pay the Comptroller General ruled that enlisted men in the Philippine Scouts were not eligible to retirement and therefore that the disbursing officer was not entitled to make payment to him.

Thereupon this bill was filed to compel the Chief of Finance of the Army to make such payments and to restrain the Comptroller General from interfering with such action.

Each defendant has filed a motion to dismiss the bill and to discharge the rule issued thereon.

The case has been unusually well presented both in the oral argument and in very thorough and interesting briefs filed by counsel of record and by Col. W. A. Graham and Major Archibald King, of the Judge Advocate General's department of the Army.

The case arises out of a very serious difference of opinion between the Comptroller General and the War Department, [fol. 9] and the briefs discuss the powers of each branch of the Government. Because of the importance of the question and of the thorough way in which it has been presented I wish I could discuss the law in detail and give at length my reasons, but I have not time to do this. I do not think it necessary to decide all the questions raised by counsel.

I conclude that the motions to dismiss must be overruled for the following reasons:

1. In my judgment the Philippine Scouts are and since their organization have been part of the Army of the United States. Enlisted men and noncommissioned officers of the Scouts are entitled to retirement after thirty years' continuous service.

If plaintiff is eligible to retirement it is admitted that he performed the necessary service and that by appropriate order of October 31, 1931, he was retired.

Having found that the law authorized retirement I do not think the court is bound by the decision of the Comptroller General to the contrary.

2. The next question is that of appropriation.

The bill alleges on page 5 the existence of the appropriation with which to pay plaintiff. It may be contended that the motion to dismiss admits this averment. In their supplemental brief counsel for the Comptroller General argued that the appropriation does not exist, and this question has been discussed by Col. Graham and Major King. Again I think this is a question of law upon which the court is not bound by the Comptroller General. The appropriation is "for the pay of retired enlisted men." Having held that plaintiff is a retired enlisted man I conclude that he comes within this language.

3. It may be that plaintiff has a remedy in the Court of Claims. But having held that he is legally retired and that there is money available to pay him, I think the duty of pay-

ment is a ministerial one, and that this court has authority to compel the performance of that duty.

June 10, 1932.

Jesse C. Adkins, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF J. RAYMOND MCCARL TO RULE AND BILL—Filed June 16, 1932

* * * * * * *

Comes now the defendant, J. Raymond McCarl, as Comptroller General of the United States, now and at all times saving and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the bill of complaint filed herein, and reserving unto himself all benefits of the lack of jurisdiction of the court appearing upon the face of said bill to grant the relief prayed for, and the lack of jurisdiction of the court to enjoin or restrain him as Comptroller General of the United States in the performance of the discretionary duties conferred and enjoined upon him officially by the statutory laws of the United States, and relying upon the same for answer to so much of the said bill of complaint as he is advised is material for him to answer, says as follows:

[fol. 10] 1. He admits that he is a citizen of the United States, is Comptroller General of the United States, and resides in the District of Columbia for the purpose of performing his official duties as Comptroller General of the United States. He has no knowledge or information sufficient to form a belief respecting whether the plaintiff is a citizen of the Philippine Islands or a national of the United States and says, moreover, that such allegations are conclusions of law not required to be answered by this defendant. Although he admits the plaintiff has resided in the Philippine Islands during the period he has served as an enlisted man in the Philippine Scouts, he denies any inference or implication which might arise from the allegations in the bill of complaint that the plaintiff is a citizen of the United States. He says with respect to the allegations concerning the office and residence of the defendant,

Frederick W. Coleman, that they are for answer by that defendant.

2. He avers that the allegations contained in paragraph 2 of the bill of complaint that the plaintiff was placed upon the retired list of the Army under and by virtue of the authority contained in the act of March 2, 1907, the provisions of which act the court will notice judicially, constitute conclusions of law not required to be answered by this defendant; but if such is not the case, then this defendant denies such allegations. This defendant avers further he has no knowledge or information sufficient to form a belief with respect to the allegations contained in the bill that the plaintiff duly made application to the President for retirement on October 31, 1931, and was by direction of the President placed upon the retired list, and if such averments are material in the present proceeding proof thereof is demanded. He admits the issuance of the War Department Special Orders No. 207, dated September 3, 1931, in paragraph 35 of which the retirement of the plaintiff was announced as set forth (quoted) in the bill of complaint. He says that he is advised and believes that whether the plaintiff enlisted in the Army of the United States when he enlisted in the organization of the Philippine Scouts for service therein and whether that organization is, or was, a component part of the Army are conclusions of law which are neither required to be admitted or denied by this defendant, but that they are matters to be ascertained and decided upon an examination of the laws of the United States. He further avers that he has no personal knowledge or information respecting the service of the plaintiff but has been advised and believes, through a report dated December 9, 1931, subscribed by The Adjutant General of the Army, that the service of the plaintiff has been as follows:

"The records of this office show that Santos Miguel, R-320883, enlisted October 1, 1901, was discharged September 30, 1904, per ETS, a sgt., 17th Co., Philippine Scouts.

"Enlisted Oct. 1 1904, discharged Sept. 30, 1907, per ETS, 1st sgt., 17th Co., P. S.

"Enlisted Oct. 1, 1907, discharged Sept. 30, 1910, per ETS, battalion sergeant major, 6th Battalion, P. S.

"Enlisted October 1, 1910, discharged Sept. 30, 1913, per ETS, battalion sergeant major 6th Battalion, P. S.

[fol. 11] "Enlisted October 1, 1913, discharged Sept. 30, 1917, per ETS, battalion sergeant major, 6th Battalion, P. S.

"Enlisted October 1, 1917, discharged August 7, 1919, by reason of termination of the emergency, battalion sergeant major, Hq. Co., 1st Philippine Infantry (prov.).

"Enlisted August 8, 1919, discharged August 7, 1920, per ETS, staff sergeant, Hq. Co., 1st Philippine Infantry (prov.)

"Enlisted August 8, 1920, discharged August 7, 1923, per ETS, master sgt., Hq. Co., 45th Infantry (P. S.).

"Enlisted August 8, 1923, discharged August 7, 1926, per ETS, master sergt, Service Co., 45th Infantry (P. S.).

"Enlisted August 8, 1926, discharged August 7, 1929, per ETS, master sgt., Service Co., 45th Infantry (P. S.).

"Enlisted August 8, 1929, retired October 31, 1931, master sergeant, Service Company, 45th Infantry (P. S.)."

He has been advised and believes, also, that the enlistment contracts executed and sworn to by the plaintiff show that the plaintiff enlisted on October 1, 1901, for service in the 17th Company of Native Philippine Scouts, at which time he gave his age as 22 years; that he reenlisted for service in the Philippine Scout organization on October 1, 1904, at which time he gave his age as 25 years; that he again reenlisted on October 1, 1907, at which time he gave his age as 24 years and 11 months; that he again reenlisted on October 1, 1910, at which time he gave his age as 26 years and 11 months; that he reenlisted on October 1, 1913, at which time he gave his age as 29 years; and that he reenlisted October 1, 1917, at which time he gave his age as 33 years, and that thereafter in reenlisting in said Philippine Scout organization he gave his birth date as November 1, 1884.

3. He is advised and believes that the court will take judicial notice of the provisions of the statutory law set forth in paragraph 3 of the bill of complaint, and, therefore, that no further answer to the allegations of that paragraph are required of this defendant.

4. He is advised and believes that the allegations in paragraph 4 of the bill of complaint that the Secretary of War

fixed the retired pay and allowances of the enlisted men of the Philippine Scouts pursuant to the authority contained in the act of February 2, 1901, 31 Stat. 757, as amended by the act of May 10, 1926, is a conclusion of law which is not required to be answered by this defendant; but if this is not the case, then this defendant denies the said allegations and avers on the contrary that the cited statute does not authorize the Secretary of War to fix rates of retired pay and allowances for enlisted men of the Philippine Scouts but has to do solely with the pay and allowances of said Philippine Scouts while they are in active service as enlisted men of that organization. He admits that War Department Circular No. 41, Paragraph II, dated September 21, 1931, contains the matter set forth in paragraph 4 of the bill of complaint.

5. This defendant avers that he has no knowledge or information sufficient to form a belief as to whether the plaintiff submitted to his disbursing officer, Major S. R. Beard, for payment by him a voucher for the retired pay and allowances claimed to be due plaintiff for the month of No- [fol. 12] vember, 1931, but he admits that War Department voucher, Form No. 107, designated as "pay roll" made out for the month of November, 1931, and subscribed by Major Benj. L. Jacobson, Finance Department, U. S. Army, was submitted to this defendant (received December 18, 1931) by Major S. R. Beard, through the Chief of Finance, U. S. Army, whereon Major Beard and the Chief of Finance requested this defendant to render his decision as to whether payment of the said voucher was authorized, and that while the voucher was computed in the gross sum of $50.81 on the basis of the items set forth substantially as in paragraph 5 of the bill of complaint, a debit entry of $4.02 appears in the voucher submitted to this defendant, to cover an insurance premium of the plaintiff, and that the net amount of the voucher, therefore, which was claimed for direct payment to the plaintiff by the disbursing officer was only $46.79.

6. He denies the allegations of paragraph 6 of the bill of complaint, as stated in the bill, and the innuendoes arising therefrom, except as they are expressly admitted herein in the averments of this defendant, and says that the facts in that respect within the knowledge of this defendant are as follows and not otherwise, to wit:

A voucher subscribed by Major Benj. L. Jacobson, Finance Department, covering the plaintiff's claim for retired pay in the gross sum of $50.81, and in the net amount of $46.79, was transmitted by the disbursing officer before whom the voucher was pending for payment, Major S. R. Beard, bonded Army finance officer, headquarters Philippine Department, to this defendant through the Chief of Finance, on November 5, 1931, with a request for decision by this defendant as to whether payment on the voucher was authorized as follows:

"Subject: Retired Pay.

"To: Comptroller General of the United States, through Chief of Finance, Washington, D. C.

"1. The accompanying voucher covering retired pay of Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (P. S.), is forwarded with request for an advance decision as to the legal authority for payment.

"2. Reasonable doubt exists as to the authority of the Secretary of War, under the provisions of the act of February 2, 1901, as amended by act of May 10, 1926 (44 Stat. 496), to authorize retirement and fix the retired pay and allowances of enlisted men of the Philippine Scouts, as prescribed in Section II, Circular 41, War Department, dated September 21, 1931, copy herewith.

"3. The voucher referred to in paragraph 1 above was referred to the undersigned as disbursing officer, office of the finance officer, Philippine Department, Manila, for payment.

"(S.) S. R. Beard, Major, F. D., Disbursing Officer."

[fol. 13] This request from Major Beard for decision of this defendant was forwarded to this defendant from the War Department on December 16, 1931, by 1st Ind., which, in part, is as follows:

241.18-FAA (Miguel, Santos), #R-320883. 1st Ind.

War Department, Office Chief of Finance, Washington

December 16, 1931.

To the Comptroller General of the United States, Washington, D. C.:

"1. This request for advance decision is made under the authority contained in the act of July 31, 1894 (28 Stat.

208; U. S. C. 31:74): It is requested that such decision, when rendered, be forwarded to the disbursing officer, through this office."

This defendant thereupon gave full consideration to the voucher and statements presented in support of the request for his decision, and also carefully considered the statutes and their legislative history governing the pay of the Philippine Scout organization, and considered also the opinions which had been delivered in reference to the status of the Philippine Scouts by and under former Secretaries of War and by the Government accounting officers, and considered the status of the Philippine Islands as an unincorporated Territory of the United States and the status of the natives thereof, as well as the various appropriation acts which have made provision for pay and allowances of the Philippine Scouts, and he reached the conclusion that payment of retired pay and allowances to the plaintiff, on the voucher presented, under existing appropriations of the public moneys, was not authorized. He thereupon rendered his decision to Major Beard through the office of the Chief of Finance, Washington, D. C., as requested by Major Beard, the decision being dated January 19, 1932, published in 11 Comp. Gen. 275. A copy of the said decision is attached hereto as Exhibit A and is made a part hereof. The decision is self-explanatory and sufficiently recites certain of the doubts entertained by this defendant which led him to hold the payment of the voucher not authorized. The concluding paragraph thereof contains the decision of this defendant on the question presented by Major Beard as follows:

"You are not authorized to pay the voucher which will be retained in the files of this office."

This defendant avers that the application for the decision, and the Chief of Finance in his indorsement so recites, was made, and the decision was rendered, under paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended, which is set out in paragraph 3 of section 74, U. S. Code Supplement, as follows:

"Disbursing officers, or the head of any executive department, or other establishment not under any of the ex-

ecutive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. * * *"

[fol. 14] This provision of law has been restated to show its particular application in the War Department and detailed regulations have been promulgated thereon in Army Regulations 35-730, dated May 20, 1930, as follows:

"2. Statutory provisions relative to decisions. a. Disbursing officers or the Secretary of War may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under him, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. See sec. 8, act July 31, 1894 (28 Stat. 208; U. S. C. 31:74; sec. 1672, M. L. 1929).

"b. A disbursing officer in whose accounts the General Accounting Office makes a disallowance may, at any time within one year from the date of the disallowance, make request upon the Comptroller General for review of the action of the General Accounting Office in making the disallowance and revision thereof. See sec. 8, act July 31, 1894 (28 Stat. 207).

"3. Classification of decisions. a. The statutes cited above provide for two general classes of decisions to be rendered by the Comptroller General: (1) Decisions in advance of payment (commonly called advance decisions) upon any question involving a payment to be made, and (2) decisions in the nature of reviews of disallowances. The first class is requested and rendered before making payment and is a safeguard against disallowance. The second class is rendered, after the payment has been made and disallowed, in response to an effort to overcome the disallowance.

"b. There are also two other classes of decisions frequently rendered by the Comptroller General: (1) Reviews of the action of the General Accounting Office in disallowing claims submitted to that office for direct settlement (see par. 4c), and (2) decisions rendered by the Comptroller

General upon his own motion, relative to some question arising in connection with the work of his office.

"c. The procedure for requesting decisions of the classes mentioned in a and b above is prescribed in paragraph 4.

"4. Requests for decisions. As indicated in paragraph 2a, advance decisions may be requested by disbursing officers or the Secretary of War. There is no authority of law for request by any other officer of the Army or War Department for this class of decisions.

"a. Requests by the Secretary of War. Unless otherwise directed by the Secretary of War—

"(1) The chief of any arm, service, or bureau of the War Department who desires an advance decision by the Comptroller General upon any problem with which he is confronted in the administration of his duties, and as to which the Comptroller General is authorized by statute (par. 2) to render a decision, will transmit his request therefor to the Chief of Finance, either in the form of a letter addressed to him, or in the form of a draft of letter to the Comptroller General prepared for the signature of the Secretary of War.

"(2) The Chief of Finance, upon receipt of such request, will prepare it for action by the Secretary of War and will transmit same stating his concurrence, or other comment, to the Judge Advocate General for his concurrence or comment.

[fol. 15] "(3) If the Chief of Finance and the Judge Advocate General are in accord as to the proposed request for decision, it will be presented to the Secretary of War for signature. If they do not agree conference will be held between representatives of the two officers with a view to securing agreement, if possible. If agreement is not reached through such conference, the request for decision when presented to the Secretary of War for his action, will be accompanied by a statement by the dissenting officer of his reason for withholding concurrence. Requests pertaining to the procurement of military supplies will be routed through the office of the Assistant Secretary of War.

"(4) The procedure prescribed in (1), (2), and (3) above will not apply to requests originating in the office of either Assistant Secretary of War. Such requests will be pre-

pared and submitted in accordance with such procedure as may be prescribed by those officers.

"b. Requests by disbursing officers for advance decisions, and requests for review of disallowances by disbursing officers or by other officers having custody of disbursing officers' retained records, will be prepared and submitted as prescribed by the Chief of Finance.

"c. Any person serving in or with the Army, who has presented a claim to the General Accounting Office for direct settlement and has been advised of the disallowance of such claim by that office, or has been allowed a sum less than that to which he believes himself entitled may, at any time within one year after the date of such disallowance or decreased allowance, request review thereof by the Comptroller General."

This defendant avers that the official decision of this defendant on the plaintiff's claim did not undertake to set aside the administrative action of the War Department placing the plaintiff on the retired list, and had to do solely with the question of whether there was an existing appropriation of public money available for payment of retired pay and allowances to plaintiff because of such placing of the plaintiff on the retired list. This defendant avers further that his decision followed a practice which the Government accounting officers have followed without interruption, at least, since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether payment on a claim is authorized under existing appropriations, except only in those rare cases where the Congress has by specific language made the finding or decision of some other official conclusive on the question of whether payment is authorized. This defendant further avers that there was no coercion whatever involved by this defendant upon the Chief of Finance, U. S. Army, or the disbursing officer, Major Beard, but that the statute itself required this defendant to render his decision on the question presented, as this defendant should decide the law to be "without direction from any other officer." (Section 304, act of June 10, 1921, 42 Stat. 24, U. S. C. 31:44.) The statute under which the decision was required to be rendered itself declared in unequivocal terms what the effect of the decision shall be, namely, that it shall govern the General Accounting Office, under the direction

of this defendant, "in passing upon the account involved." [fol. 16] The statutory law of the United States also declares what the duty of this defendant shall be in case his decision is not followed and it becomes necessary to disallow credit in the disbursing account for a payment contrary to the decision. (Sections 3624 to 3633, Revised Statutes, as amended, U. S. Code 31:505 to 514.) This defendant also avers that the Chief of Finance, United States Army, does not function as a bonded disbursing officer and that no statute appears to vest that official with any authority and that he does not have authority to direct any bonded disbursing officer to make a payment which this defendant, in a formal decision rendered under the cited act of July 31, 1894, as amended, has held unauthorized under appropriations of public moneys.

7. He denies the allegations contained in paragraph 7 of the bill of complaint that any funds appropriated by the Congress for the pay and allowances of retired enlisted men of the Army are now available, or have been available, for payment of retired pay to the plaintiff. He says, moreover, that at the time the bill of complaint was filed there was a deficiency under "Pay of the Army" in the amount of approximately $1,900,000 and that the pay and allowances, even of the active forces of the United States Regular Army, necessarily would be suspended on or before June 30, 1932, for lack of an appropriation should the Congress fail to enact the pending second deficiency bill which contains an item of $1,900,000, or thereabouts, proposed to enable the War Department to meet the current pay rolls of personnel to the end of the present fiscal year; that is, to June 30, 1932. Whether or not the deficiency appropriation is made available, however, this defendant avers is immaterial to the question presented on the bill of complaint. For the decision by this defendant that no existing appropriations of public moneys are authorized to be used to pay the plaintiff retired pay is based upon this defendant's finding and conclusion that the Congress has never specifically provided any appropriation authorized to be used for payment of retired pay to enlisted men whose active service in the Philippine Scouts has been terminated, and that the War Department has never brought to the attenton of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contem-

plated or had been accomplished. This defendant denies that there has been any unlawful interference by this defendant, or on his behalf, with respect to the claim of the plaintiff for retired pay.

This defendant avers, also, that he has no knowledge or information sufficient to form a belief respecting the manner in which the plaintiff has served as an enlisted man in the Philippine Scouts, or as to what he has been advised or believed he would be entitled to upon completing thirty years' service in the Philippine Scouts. And this defendant avers further that he has no knowledge or information sufficient to form a belief respecting the number of enlisted men of the Philippine Scouts who have completed or are about to complete thirty years' service in that organization, or as to what effect it will have upon the morale of the organization of the Philippine Scouts that there is no appropriation for payment to the plaintiff upon his claim for retired pay and suggests that the effect, if any, is a question of policy for consideration by the Congress. If [fol. 17] any implications or inferences are intended to be drawn from the reiteration in the allegations of the bill respecting the service of the plaintiff in the "United States Army" that the plaintiff is entitled to the same benefits of retirement pay, allowances, etc., as enlisted men of the Regular Army, then the allegations to that effect are specifically denied by this defendant.

8. The allegations and conclusions set forth in paragraph 8 of the bill of complaint, as stated, in so far as they are material, are denied by this defendant; and this defendant avers that the respective official duties of this defendant as Comptroller General of the United States and of the Secretary of War are prescribed and defined by statutory laws of which this court will take judicial notice, and that whatever the effect of the action of the Secretary of War may be of having ordered the placing of the plaintiff on a retired list of the Army is a matter wholly separate and apart from the question of what effect that action may have to entitle the plaintiff to payment of retired pay out of appropriated moneys of the United States, which latter question the law has committed to the official discretion of this defendant to decide; and that as found and decided by defendant in performance of his statutory duties there is no appropriation available for payment of such retired pay,

the action of the Secretary of War can not withdraw for such a payment public moneys from the Treasury of the United States—article 1, section 9, paragraph 7, of the Constitution of the United States declaring that "No money shall be drawn from the Treasury but in consequence of appropriations made by law," and that the statutory duties placed upon defendant by the Congress have made the determination of the availability of an appropriation for a payment solely a question for decision by defendant.

Answering further, this defendant says that there has been no unlawful or improper failure, omission, or refusal to pay the plaintiff retired pay out of the appropriated moneys of the United States, and he denies that the plaintiff has suffered any irreparable injury or that he does not have an adequate and complete remedy under the Tucker Act by an action at law, and says, on the contrary, that the plaintiff has a plain, adequate, and complete remedy at law in the Court of Claims, which is the only remedy which the Congress has provided for the plaintiff or others in his situation who disagree with the decisions of this defendant respecting what uses may be made of the appropriated moneys of the United States. This defendant says, also, that the Secretary of War on February 15, 1932, claiming to be acting under section 148 of the Revised Statutes, transmitted to the Court of Claims a request that that court should review the decision of this defendant and should determine judicially what the legal rights of the defendant to retired pay may be, if any. That reference by the Secretary of War is now pending before the Court of Claims for decision and is docketed as Court of Claims departmental reference No. 169. Whether or not the Court of Claims has jurisdiction to pass upon the question in the form presented, it is certain that it has jurisdiction of the identical claim of the plaintiff in a direct action by him which he is now attempting to establish in this proceeding for an injunction.

This defendant says that the sole object of this proceeding is to establish a claim against the United States and to [fol. 18] have this court restrain this defendant from obeying a specific injunction of the law as to what effect this defendant shall give his own decisions, and that the issuance of such a writ as prayed would result in direct conflict with the law fixing this defendant's jurisdiction and would seriously interfere with the control of the Congress over the

public moneys, disrupt the functioning of the accounting system through the substitution of peremptory judicial writs for decisions of the Comptroller General, and, accordingly, this defendant having fully answered prays this honorable court to dismiss the bill of complaint for an injunction, to discharge the rule to show cause and that he may have his costs, assessed against the plaintiff.

J. R. McCarl, Comptroller General of the United States; Leo A. Rover, United States Attorney, D. C.; John W. Fihelly, C., Asst. United States Attorney, D. C.; R. L. Golze, General Counsel; Harrell O. Hoagland, Principal Attorney, Attorneys for the Defendant, Comptroller General of the United States.

Duly sworn to by J. Raymond McCarl. Jurat omitted in printing.

EXHIBIT "A" TO ANSWER

A-40048

Comptroller General of the United States, Washington

January 19, 1932.

Major S. R. Beard, F. D., U. S. Army, Office of Finance Officer, Headquarters, Philippine Department, Through Chief of Finance.

SIR: There has been received your letter of November 5, 1931, requesting decision whether you are authorized to make payment on a pay-roll voucher transmitted therewith in the sum of $50.81 representing retired pay and allowances of Santos Miguel, master sergeant, Philippine Scouts, retired, for the month of October (November), 1931, who is stated to have been placed on the retired list effective October 31, 1931, in accordance with paragraph 35, War Department Special Orders No. 207, of September 3, 1931.

[fol. 19] A statement of the soldier's service shows that he first enlisted in the Philippine Scouts October 1, 1901, serving continuously therein until October 31, 1931, when he was retired pursuant to paragraph 35 of War Department Spe-

cial Orders No. 207, dated September 3, 1931. The retirement benefits which it is proposed to allow are based partly on the provisions of the act of March 2, 1907, 34 Stat. 1217, and partly under the authority vested in the Secretary of War under the provisions of section 36 of the act of February 2, 1901, 31 Stat. 757, as amended by the act of May 10, 1926, 44 Stat. 496. That is to say, the voucher computes the retired "pay" at three-fourths of $53.75, the pay he was receiving on October 31, 1931, as a master sergeant, Philippine Scouts ($40.31), plus $10.50, representing two-thirds of the allowance authorized by the act of March 2, 1907, to be paid to enlisted men of the Army, Navy, or Marine Corps, who have been retired after thirty years' service under section 2, War Department Circular No. 41, dated September 21, 1931.

Section 36 of the act of February 2, 1901, 31 Stat. 757, provides:

"That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand.

"The majors to command the squadrons and battalions shall be selected by the President from captains of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of the grade of major. The captains of the troops or companies shall be selected by the President from first lieutenants of the line of the Regular Army, and while so serving they shall have the rank, pay, and allowances of captain of the arm to which assigned. The squadrons and battalion staff officers and first and sec-

ond lieutenants of companies may selected from the non-commissioned officers or enlisted n of the Regular Army of not less than two years' servic , or from officers or non-commissioned officers or enlisted men serving, or who have served, in the volunteers subsequent to April twenty-first, eighteen hundred and ninety-eight, and officers of those grades shall be given provisional appointments for periods of four years each, and no such appointments shall be continued for a second or subsequent term unless the officer's conduct shall have been satisfactory in every respect. The pay and allowances of provisional officers of native organizations shall be those authorized for officers of like grades in the Regular Army. The pay, rations, and clothing allowances to be authorized for the enlisted men *men* shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army.

[fol. 20] "When, in the opinion of the President, natives of the Philippine Islands shall, by their services and character, show fitness for command, the President is authorized to make provisional appointments to the grades of second and first lieutenants from such natives, who, when so appointed, shall have the pay and allowances to be fixed by the Secretary of War, not exceeding those of corresponding grades of the Regular Army."

Section 22 of the national defense act of June 3, 1916, 39 Stat. 181, provides that all existing laws pertaining to the Philippine Scouts shall continue and remain in force, except as therein specifically provided otherwise. Section 26 provides:

"Retirement of Officers of Philippine Scouts.—Captains and lieutenants of Philippine Scouts who are citizens of the United States shall hereafter be entitled to retirement under the laws governing the retirement of enlisted men of the Regular Army, except that they shall be retired in the grade held by them at the date of retirement, shall be entitled to retirement for disability under the same conditions as officers of the Regular Army, and that they shall receive, as retired pay, the amounts allowed by law, as retired pay and allowances, of master signal electricians of the United States Army, and no more: Provided, That double time for service beyond the continental limits of the United States

shall not be counted for the purposes of this section so as to reduce the actual period of service below twenty years: Provided further, That former officers of the Philippine Scouts who, because of disability occasioned by wounds received in action, have resigned or been discharged from the service, or who have heretofore served as such for a period of more than five years and have been retired as enlisted men, shall be placed upon the retired list as officers of Philippine Scouts and thereafter receive the retired pay and allowances provided by this section for other officers of Philippine Scouts: And provided further, That any former officer of Philippine Scouts who vacated his office in the Philippine Scouts by discharge or resignation on account of disability contracted in the line of duty and who was subsequently retired as an enlisted man, except any former officer of Philippine Scouts who has been retired as an enlisted man by special Act of Congress, shall be transferred to the retired list created by this section and shall thereafter receive the retired pay and allowances authorized by this section, and no more. Officers of Philippine Scouts retired under the provisions of this section shall not form part of the limited retired list now authorized by law."

Said section 26 was repealed by the act of June 4, 1920, 41 Stat. 775, and in lieu thereof there was added section 22 (a), 41 Stat. 770, which provided that:

"The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient, within the limit of strength prescribed by law, organized similarly to those of the Regular Army, the officers to be detailed from those authorized in section 4 hereof. On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this Act, and those not so recom- [fol. 21] missioned shall continue to serve under their commissions as officers of the Philippine Scouts. No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers com-

missioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of equal service. Officers of the Philippine Scouts shall hereafter be retired under the same conditions, and those hereafter placed on the retired list shall receive the same retired pay, as other officers of like grades and length of service, and shall be equally eligible for advancement on account of active duty performed since retirement. *Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts.*" [*Underscoring* supplied.]

Section 17 of the act of June 10, 1922, 42 Stat. 632, provides that officers and former officers of the Philippine Scouts, who were placed on the retired list prior to June 4, 1920, shall be entitled to promotion on the retired list for active duty performed subsequent to retirement in accordance with section 127 (a) of the act of June 3, 1916, as amended, and to the same pay and benefits received by other officers of the Army of like grade and length of service on the retired list, and section 21 thereof provided:

"That nothing in this Act shall operate to change in any way existing laws, or regulations made in pursuance of law governing pay and allowances of * * * the enlisted men of the Philippine Scouts * * *."

The act of March 2, 1907, 34 Stat. 1217, providing for the retirement of noncommissioned officers, petty officers, and enlisted men of the Army, Navy, and Marine Corps of the United States is worded as follows:

"That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: Provided, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited."

It seems clear from this legislative history that in authorizing the enlistment in the Army of natives of the Philippine Islands to be organized as scouts and when deemed necessary "as troops or companies as authorized * * * for the Regular Army" that it was not contemplated that any member of such organization of natives of the Philippine Islands should be entitled to retirement, either officers or enlisted men. By section 22 of the act of June 3, 1916, provision was made for placing on the retired list captains and lieutenants of the Philippine Scouts citizens of the United States under the laws governing the retirement of enlisted men of the Regular Army. This provision for the retirement of officers of the Philippine Scouts [fol. 22] has been changed by subsequent legislation, but it has been specifically provided that nothing therein should alter in any respect the present status of enlisted men of the Philippine Scouts. No law has modified the status of enlisted men of the Philippine Scouts as fixed by the act of 1901. The inapplicability of the laws relating to the retirement of enlisted men of the Regular Army to the Philippine Scouts is made apparent by section 26 of the act of June 3, 1916, in restricting the counting of double time by the officers of the Philippine Scouts therein authorized to be retired as enlisted men of the Regular Army, and this inapplicability is further apparent in the act of 1907 providing for the retirement of enlisted men of the Regular Army which fixes the commuted value for rations, clothing, quarters, fuel, and light in excess of the pay paid enlisted men of the Philippine Scouts in the lower grades. There is for noting, also, that this is a military organization composed of natives of a Territory under the sovereignty of the United States organized primarily for duty in that Territory and that it is the declared purpose of the United States "to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein." Act of August 29, 1916, 39 Stat. 545. It is to be observed that in the retirement of these natives of the Philippine Islands the American taxpayer is being asked, in addition to supporting a native force in the Philippne Islands for the maintenance of order there for the benefit of the inhabitants of those Islands, to also support enlisted members of that force for the remainder of their lives at a sub-

stantial retired pay after they were afforded such employment for 30 years. The retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws.

You are not authorized to pay the voucher which will be retained in the files of this office.

Respectfully, (Signed) J. R. McCarl, Comptroller General of the United States.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF FREDERICK W. COLEMAN—Filed June 17, 1932

* * * * * * *

1. This defendant, on information and belief, admits the allegations of paragraph 1 of the bill of complaint concerning plaintiff, Santos Miguel, and defendant J. Raymond McCarl. This defendant admits the allegations of paragraph 1 concerning himself.

2. This defendant, on information and belief, admits the facts alleged in paragraph 2 of the bill.

3. This defendant admits the existence of the statutes quoted in paragraph 3 of the bill.

4. This defendant admits the allegations of fact in paragraph 4 of the bill.

5. This defendant, on information and belief, admits the allegations of paragraph 5 of the bill.

[fol. 23] 6. This defendant admits that the disbursing officer mentioned in the bill, Major S. R. Beard, Finance Department, U. S. Army, transmitted the voucher mentioned in the bill through the office of the Chief of Finance, U. S. Army, to defendant McCarl, Comptroller General of the United States, for an advance decision by him as to the legal authority for its payment, and that defendant McCarl rendered an advance decision as alleged. This defendant further admits that said disbursing officer, Major Beard, because of the above decision of defendant McCarl, has declined and still declines to pay plaintiff the sums represented by the voucher mentioned in the bill or any other sums as pay and allowances of a retired enlisted man. This defendant denies that he has declined to order pay-

ment to plaintiff of pay or allowances as a retired enlisted man of the Army, but admits that he has not ordered such payment, for the reason that he is advised and believes that if such payment should be ordered by him, the Comptroller General of the United States would not allow credit therefor.

7. This defendant admits that Congress has appropriated funds for payment of the pay and allowances of retired enlisted men of the Army and that such funds are now available for payment and would be paid to plaintiff if vouchers therefor would be passed by defendant McCarl. This defendant admits that plaintiff has served honestly and faithfully for thirty years as an enlisted man in the Army under officers of the Army. This defendant admits that plaintiff's pay and allowances as a retired enlisted man are withheld in consequence of the decision rendered and position taken by defendant McCarl as hereinbefore stated. This defendant, on information and belief, admits that there are a considerable number of enlisted men of Philippine Scouts who have completed, or are about to complete thirty years service in the Army, and that the decision rendered and position taken by defendant McCarl do and will injuriously affect the morale of a component part of the Army, to wit, the Philippine Scouts. As to other matters alleged by plaintiff in paragraph 7 of his bill, this defendant knows nothing.

8. Inasmuch as paragraph 8 of plaintiff's bill consists wholly of conclusions of law and contains no allegations of fact, this defendant respectfully prays to be excused from answering the same.

Wherefore, having fully answered plaintiff's bill of complaint, this defendant prays this honorable court that he be discharged with his costs.

Frederick W. Coleman, Chief of Finance, U. S. Army. Leo A. Rover, United States Attorney; John W. Fihelly, Assistant United States Attorney; W. A. Graham, Colonel, Judge Advocate General's Dept., U. S. Army; Archibald King, Major, Judge Advocate General's Dept., U. S. Army, Attorneys for Defendant, Frederick W. Coleman.

[fol. 24] *Duly sworn to by Frederick W. Coleman. Jurat omitted in printing.*

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO STRIKE DEFENDANTS' ANSWERS TO BILL OF COMPLAINT—Filed June 23, 1932

* * * * * * *

Now comes the plaintiff, by his attorneys, and moves the court to strike out the answers of the defendants to the bill of complaint herein filed, and to award plaintiff a decree pro confesso for the following reasons, to wit:

1. The answers are insufficient in law.

2. The answers do not raise any issue of fact.

3. Under the admitted facts the legal issues involved in this cause have been decided by this court. See memorandum filed herein June 10, 1932.

4. Under the admitted facts and the decision of this court, (a) the Philippine Scouts are and since their organization have been part of the Army of the United States, and enlisted men and noncommissioned officers of that organization are entitled to retirement after thirty years continuous service; (b) the plaintiff is a retired enlisted man of the Army; (c) Congress has appropriated funds, which are now available for the payment of his retired pay as such an enlisted man; and (d), having been legally retired and there being money available to pay him, the duty of payment is a ministerial one the performance of which duty this court has authority to compel.

5. Under the admitted facts the Comptroller General of the United States was and is without authority to interfere with the Chief of Finance, U. S. Army, to prevent the payment to plaintiff of the pay due him as a retired enlisted man.

6. Under the admitted facts it is the plain ministerial duty of the defendant, Frederick W. Coleman, Chief of Finance, U. S. Army, to pay or cause to be paid to plaintiff the pay due him as a retired enlisted man of the United States Army.

Samuel T. Ansell, Burr Tracy Ansell, George M. Wilmeth, Attorneys for Plaintiff.

Service of a copy of the foregoing and annexed motion accepted this 23rd day of June, 1932.

Walter M. Shea, Asst. U. S. Atty., of Counsel for Defendants.

[fol. 25] In Supreme Court of District of Columbia

Memorandum Opinion—Filed July 16, 1932

* * * * * * *

This matter comes on for hearing on plaintiff's motion to strike the answers of the defendants herein filed and to award plaintiff a decree pro confesso.

An examination of the answers filed by the defendant J. Raymond McCarl, Comptroller General of the United States, and of the defendant Frederick W. Coleman, Chief of Finance, U. S. Army, fails to disclose any issue of fact other than as raised by admitted facts. As to such issues, the law of the case was settled by Mr. Justice Adkins as shown by his memorandum filed herein on June 10, 1932.

It follows that plaintiff's motion here considered should be sustained. It is so ordered.

July 16, 1932.

F. D. Letts, Justice.

In Supreme Court of District of Columbia

Final Decree—Filed September 16, 1932

* * * * * * *

This cause coming on for hearing at this term, first upon separate motions by the respective defendants to dismiss the bill of complaint herein; and second, the defendants having answered, upon motion by the plaintiff to strike out the separate answers of the respective defendants to the said bill of complaint, and after considering the arguments of counsel for both sides, it is by the court this 16th day of September, 1932,

Adjudged, ordered, and decreed, that (1) the said motions by the respective defendants to dismiss the said bill of complaint be and the same are hereby overruled; and

(2) the said motion by the plaintiff to strike out the said answers of the respective defendants be and the same hereby is allowed; and, the respective defendants having failed to file other answers or defense to the said bill of complaint within the time required by the rules of the court, but having elected to stand on their respective motions to dismiss and on their answers as filed, and having stipulated that a final decree be taken at this time, it is further

Adjudged, ordered, and decreed, that (1) the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defendant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant, and (2) the defendant, [fol. 26] Frederick W. Coleman, Chief of Finance, United States Army, be and he is hereby enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months, and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men of the Army.

By the Court:

Jesse C. Adkins, Justice.

No objection as to form. The defendants consent to the entry of final decree herein in place of decree pro confesso.

John W. Fihelly, Assistant United States Attorney.

In Supreme Court of District of Columbia

Notation of Appeal—Filed October 5, 1932

* * * * * * *

From the final decree entered in the above entitled cause on September 16, 1932, the defendants, in open court and

in the presence of the attorney for the plaintiff, noted an appeal to the Court of Appeals of the District of Columbia, this 5" day of October, 1932.

Jesse C. Adkins, Justice.

MEMORANDUM

October 19, 1932.

Time within which to file assignment of errors and designation of record extended from day to day, to and including, November 21, 1932.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS ON BEHALF OF J. RAYMOND MCCARL, AS COMPTROLLER GENERAL OF THE UNITED STATES—Filed November 19, 1932.

* * * * * * *

Now comes the defendant J. Raymond McCarl, as Comptroller General of the United States, by his attorneys, and assigns for errors that the court erred—

1. In overruling the motions of the respective defendants to dismiss the bill of complaint for an injunction and to discharge the rule to show cause.

2. In granting the plaintiff's motion to strike the answer of the defendant, Comptroller General of the United States, to the bill of complaint and to the rule to show cause.

3. In taking jurisdiction to pass upon and decide the question of plaintiff's right to retirement in this proceeding for an injunction.

4. In taking jurisdiction to decide the question of whether there is available an appropriation to make payment of retired pay to the plaintiff.

[fol. 27] 5. In holding that the plaintiff was authorized by the statutory laws of the United States to be placed on the retired enlisted men's list of the United States Army.

6. In holding that the plaintiff is entitled to be paid retired pay as a retired enlisted man on the retired list of the United States Army.

7. In holding that it was the ministerial duty of the defendant, Comptroller General of the United States, when the questions were presented formally for his decision in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31: 74, par. 3), to decide that the plaintiff was placed on the retired enlisted men's list of the United States Army pursuant to statutory laws and/or to decide that the plaintiff was entitled to be paid retired pay in that status contrary to what the defendant, Comptroller General of the United States, theretofore already had found and decided in a formal written decision addressed to the disbursing officer who had presented the questions and who had applied for a decision, and, also, to the Chief of Finance, United States Army, who had forwarded such questions and application for decision, by indorsement.

8. In enjoining and commanding the defendant, Chief of Finance, to pay or cause to be paid retired pay to the plaintiff for the month of November, 1931, and subsequent months, after the defendant, Comptroller General of the United States, had rendered his decision of January 19, 1932, in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31: 74, par. 3), holding that such payment was not authorized.

9. In not dismissing the plaintiff's bill of complaint for an injunction and discharging the rule to show cause on the motions to dismiss filed by the respective defendants.

10. In not overruling the plaintiff's motion to strike the answer of the defendant, Comptroller General of the United States, and for a decree pro confesso.

11. In not holding that the plaintiff has a plain, adequate, and complete remedy at law by suit in the United States Court of Claims under section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136 (U. S. C. 28:250).

12. In not holding that the bill of complaint entirely fails to show that the plaintiff will suffer any irreparable injury if relief by injunction is denied.

13. In not holding that the reference of plaintiff's claim to the Court of Claims for a decision, with the plaintiff's consent, on February 15, 1932, which reference was pending before the Court of Claims when the bill of complaint for injunction was filed herein, precluded the Supreme Court of the District of Columbia from taking jurisdiction of the proceeding for injunction.

14. In not holding that section 304 of the act of June 10, 1921, 42 Stat. 24, precludes the Supreme Court of the District of Columbia from directing the Comptroller General to decide a question presented to him under paragraph 6 [fol. 28] of section 8 of the act of July 31, 1894, 28 Stat. 204, in a particular way.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; Harrell O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendant, Comptroller General of the United States.

Messrs. Samuel T. Ansell, Burr Tracey Ansell, and George Wilmeth, Esquires, attorneys for the plaintiff:

Please take notice that we are this 18th day of November, 1932, filing the foregoing assignment of errors.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; Harrell O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendant, Comptroller General of the United States.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS ON BEHALF OF FREDERICK W. COLEMAN, AS CHIEF OF FINANCE, UNITED STATES ARMY—Filed November 19, 1932

* * * * * * *

Now comes the defendant, Frederick W. Coleman, as Chief of Finance, United States Army, by his attorneys, and assigns for errors that the court erred—

1. In overruling his motion to dismiss the bill of complaint for an injunction and to discharge the rule to show cause.

2. In granting the plaintiff's motion to strike the answer of the defendant to the bill of complaint and to the rule to show cause.

3. In taking jurisdiction to pass upon and decide the question of plaintiff's right to relief prayed for in the bill.

4. In enjoining and commanding the defendant, Chief of Finance, to pay or cause to be paid retired pay to the plaintiff for the month of November, 1931, and subsequent months, after the defendant, Comptroller General of the United States, had rendered his decision of January 19, 1932, in accordance with paragraph 6 of section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by section 304 [fol. 29] of the act of June 10, 1921, 42 Stat. 24 (U. S. C. 31:74, par. 3), holding that such payment was not authorized.

5. In not dismissing the plaintiff's bill of complaint for an injunction and discharging the rule to show cause on the motions to dismiss filed by the respective defendants.

6. In not overruling the plaintiff's motion to strike the answers of the defendants and for a decree pro confesso.

Leo A. Rover, United States Attorney. John W. Fihelly, Assistant United States Attorney.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed November 19, 1932

* * * * * * *

The clerk will please prepare a transcript of the record in the above entitled cause, on appeal to the Court of Appeals of the District of Columbia, and include therein the following:

1. Bill of complaint for injunction and the rule to show cause issued thereon April 27, 1932.

2. Separate motion of the defendant, J. Raymond McCarl, Comptroller General of the United States, to dismiss

the bill of complaint and to discharge the rule to show cause.

3. Separate motion of the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to dismiss the bill of complaint and to discharge the rule to show cause.

4. Memorandum opinion of Justice Adkins of June 10, 1932, overruling the defendants' motions to dismiss.

5. Separate answer of the defendant, Comptroller General of the United States, to the bill of complaint and to the rule to show cause and Exhibit A thereto attached.

6. Separate answer of the defendant, Chief of Finance, filed June 17, 1932, to the bill of complaint and to the rule to show cause.

7. Plaintiff's motion to strike defendants' answers.

8. Memorandum of Justice Letts dated July 16, 1932, granting plaintiff's motion to strike the answers of the defendants.

9. Final decree for injunction entered by the court September 16, 1932.

10. Notation of appeal by the defendants.

11. Assignment of errors.

12. This designation of record.

Leo A. Rover, United States Attorney for the District of Columbia; John W. Fihelly, Asst. United States Attorney for the District of Columbia; R. L. Golzé, General Counsel, General Accounting Office; H. O. Hoagland, Principal Attorney, General Accounting Office, Attorneys for the Defendants.

[fol. 30] We acknowledge service of the foregoing designation of record and receipt of a copy thereof this 19th day of November, 1932.

Burr Tracy Ansell, Attorney for the Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

Monday, May 8th, A. D. 1933.

* * * * * * *

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

SANTOS MIGUEL

The argument in the above entitled cause was commenced by Mr. H. O. Hoagland, attorney for the appellant Comptroller General. (Mr. Justice Robb not sitting.)

Tuesday, May 9th, A. D. 1933.

* * * * * * *

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

SANTOS MIGUEL

The argument in the above entitled cause was continued by Mr. H. O. Hoagland, attorney for the appellant Comptroller General, and by Mr. S. T. Ansell, attorney for the appellee, and by Messrs. Archibald King and William A. Graham, as amicii curiæ on behalf of the Secretary of War, and was concluded by Mr. H. O. Hoagland, attorney for the appellant Comptroller General. Additional authorities may be filed by either side, if desired. (Mr. Justice Robb not sitting.)

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5871

J. RAYMOND MCCARL, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, Appellants,

v.

SANTOS MIGUEL, Appellee

Appeal from the Supreme Court of the District of Columbia

(Argued May 8 and 9, 1933. Decided June 26, 1933)

Leo A. Rover, John W. Fihelly, R. L. Golze, and Harrell O. Hoagland, all of Washington, D. C., for the Comptroller General, appellant.

Samuel T. Ansell, Burr Tracy Ansell, and George M. Wilmeth, all of Washington, D. C., for appellee.

William A. Graham and Archibald King, Judges Advocate, U. S. Army, for the Secretary of War as amici curiæ.

Before Martin, Chief Justice, and Van Orsdel, Hitz, and Groner, Associate Justices

GRONER, Associate Justice:

Appellee, after more than thirty years' service in the Philippine Scouts, was retired as master sergeant pursuant to Special Orders No. 207 of the War Department, dated September 3, 1931, as follows:

"35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service.

"By order of the Secretary of War.

"Douglas MacArthur, General, Chief of Staff."

Appellee claims that the retirement order was made by authority of the act of March 2, 1907, 34 Stat. 1217, providing:

"That when an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *"

Appellee in due course after retirement submitted to an Army disbursing officer a voucher for his retired pay and allowances for the month of November 1931 in the amount of $50.81. The disbursing officer was in doubt whether the payment should be made, and submitted the question to the Comptroller General with a request for an advance opinion as to the legal authority for its payment. The Comptroller General decided that appellee was not entitled to receive retired pay as a soldier in the Army of the United States, and directed the disbursing officer not to pay the voucher. Appellee thereupon instituted proceedings in the court below to require the Comptroller General to return the voucher to the disbursing officer and likewise to compel the Chief of Finance of the Army to pay or cause the same to be duly paid. After the bill was filed in the court below and some preliminary motions disposed of, the Comptroller General answered the bill. Appellee moved to strike, and this motion was sustained and judgment entered for appellee.

The question we have to determine is whether a mandatory injunction should issue against the Comptroller General directing him to approve and allow credit for payments of retired pay and allowances to a member of the Philippine Scouts at the rate provided by Act of Congress to be paid to a retired enlisted man of the Army of the United States. The Comptroller General in his answer denied that there was any fund or appropriation by Congress for payment of retired pay to enlisted men in the Philippine Scouts. He also alleged as an affirmative defense that there was a deficiency of nearly $2,000,000 in the fund appropriated for the pay and allowances of the active forces of the United States Regular Army.

On behalf of appellee it is urged that the order of retirement made by authority of the Secretary of War is a determination of the question that appellee is an enlisted man in the Army of the United States who had served thirty

years in the Army and is entitled under the quoted retirement statute to the same proportion of pay as any other retired enlisted man of the Army. In these circumstances appellee insists that his status and compensation have been duly fixed and that an appropriation has been duly made by Congress to pay the same and that thus every fact necessary to entitled him to his retired pay being present, actual payment may not be withheld by any action on the part of the Comptroller General or the Chief of Finance of the Army.

Cases in which the extraordinary writ of mandamus or injunction was asked to require or compel specific action by an executive officer of the Government have been often before the courts for judicial consideration and determination. Some of them are Smith v. Jackson, 246 U. S. 388; Roberts, Treasurer, v. United States, 176 U. S. 221; Champion Co. v. Fisher, 227 U. S. 445; U. S. v. Lamont, 155 U. S. 303; Dunlap v. Black, 128 U. S. 40; Board of Commissioners, etc., v. Aspinwall, 65 U. S. 376; McCarl v. Cox, 8 F. (2d) 669; McCarl v. Pence 18 F. (2d) 809; United States v. Harsha, 56 Fed. 953; Hines v. Cavanagh, 39 F. (2d) 517.

In this case the grounds on which the Comptroller General based his opinion are set out in a letter to the disbursing officer in reply to the latter's request for an advance opinion as to the legality of the proposed payment. In this letter, filed as an exhibit with the answer, the Comptroller General places his refusal to approve the payment on various acts of Congress in relation to the organization of the Philippine Scouts. The first of these statutes is that of February 2, 1901, 27 Stat. 757. In section 36 thereof the President is authorized to enlist natives of the Philippine Islands for service in the Army, to be organized as scouts with such officers as he shall deem necessary for their proper control, or as troops or companies as authorized by the act for the Regular Army. The act limits the total number of enlisted men in "native organizations" to 12,000. The act also provides that the President shall appoint the commanding officers of the squadrons and battalions thus formed from officers in the Regular Army of the United States, and provides that the pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army. If in the opinion of the Presi-

dent the natives of the Islands shall by their services and character show fitness for command, the President shall be authorized to appoint them first and second lieutenants and when so appointed they shall have the pay and allowances to be fixed by the Secretary of War not exceeding those of the corresponding grades of the Regular Army.

The second act referred to is the National Defense Act of June 3, 1916, 39 Stat. 181, in which the existing law in relation to the Philippine Scouts was ordered continued in force and effect, except that by section 26 it is provided that captains and lieutenants of Philippine Scouts who are citizens of the United States shall thereafter be entitled to retirement under the laws governing the retirement of enlisted men of the Regular Army, except that they shall be retired in the grade held by them at the date of retirement, and that officers of Philippine Scouts retired under the provisions of this section shall not form part of the limited retired list now authorized by law.

It will be noticed that these acts, while referring to the organization, etc., of the Philippine Scouts (section 26), are confined to officers thereof.

Next in point of reference is the act of June 4, 1920, 41 Stat. 775, where the provision (section 26) with relation to the retirement of officers of the Scouts was repealed, and it was provided:

"On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this act, and those not so recommissioned shall continue to serve under their commissions as officers of the Philippine Scouts. No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of equal service. * * * Nothing in this act shall be construed to alter in any respect the present status *of enlisted men* of the Philippine Scouts."

A subsequent act of June 10, 1922, 42 Stat. 632, likewise conferred on officers and former officers of the Philippine Scouts the status of officers in the regular establishment, but this act, like its predecessor, provided that it should not be construed in any way as changing existing laws or regulations governing pay and allowances for the enlisted men of the Philippine Scouts.

The Comptroller General concludes his opinion as follows:

"It seems clear from this legislative history that in authorizing the enlistment in the Army of natives of the Philippine Islands to be organized as scouts and when deemed necessary 'as troops or companies as authorized * * * for the Regular Army' that it was not contemplated that any member of such organization of natives of the Philippine Islands should be entitled to retirement, either officers or enlisted men. By section 22 of the act of June 3, 1916, provision was made for placing on the retired list captains and lieutenants of the Philippine Scouts citizens of the United States under the laws governing the retirement of enlisted men of the Regular Army. This provision for the retirement of officers of the Philippine Scouts has been changed by subsequent legislation, but it has been specifically provided that nothing therein should alter in any respect the present status of enlisted men of the Philippine Scouts. No law has modified the status of enlisted men of the Philippine Scouts as fixed by the act of 1901."

We are of opinion that appellee's claim to retired pay cannot be adjudicated in this proceeding, and that his rights can only be determined in a proper suit or action instituted in the Court of Claims. The basis of this is the rule that mandamus or injunction should not issue in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion. Wilbur v. United States, 281 U. S. 206. The Comptroller General, when applied to by the disbursing paymaster of the Army, was required by law to decide the question of appellee's right to retired pay. The right was regarded as doubtful by the disbursing officer, and in order to protect himself against a disallowance by the accounting office if payment should ultimately be held not valid, he ap-

plied, in accordance with law, to the Comptroller General for an advance opinion. The opinion was given, and once given is binding on the executive branch of the Government. Skinner & Eddy Corp. v. McCarl, 275 U. S. 1. The decision of the Comptroller General made under these conditions, while conclusive so far as the executive branch of the Government is concerned; is not final in the sense that it is not subject to review in the courts, but the cases in which the courts have interfered by mandamus were cases in which there was no dispute that the petitioners were officers of the United States or creditors of the United States, and in either case that the accounting and disbursing officers had determined they were entitled to their pay or debt and that an appropriation was available in the hands of the defendant from which to make payment.

In such cases the courts are always justified in granting relief, as for instance where a statute fixes an officer's compensation, as in the case of Judge Jackson of the Panama Canal (Smith v. Jackson, supra) and appropriates money for its payment and there is no dispute as to the identity of the person petitioning and the office, nor any dispute as to the availability of the appropriation, the disbursing officer or the Comptroller General has no function to perform except the payment of the money, and upon refusal may be compelled to do so by mandamus. But where, in a case like this, there is in good faith a contest on the question whether petitioner is a retired soldier of the Army, or whether, even if he is, his right to pay is fixed by an appropriation with relation to enlisted men "in the Army, Navy, or Marine Corps", or where, as in this case is stated under oath by the Comptroller, there are no funds available, it is clear, we think, that neither mandamus nor injunction should issue. In every case which we know of in which there is a disputed question of fact itself essential to a determination of the case, or where there is a question of merits to be considered, courts have held that injunction or mandamus is not the proper remedy. Certainly there is on the face of the applicable statutes we have referred to serious doubt whether Congress has placed the enlisted personnel of the Philippine Scouts in the same class as enlisted men of the Regular Army, and if this is true, then obviously the right to mandamus is not "clear and indisputable" (Board of

Commissioners v. Aspinwall, supra), for admittedly there is no direct legislation on the subject.

Nor do we think the order of retirement directed by the Secretary of War is a conclusive finding of fact of the status of petitioner. So far as appears, it was a routine matter, but whether routine or not, it was effective only if authorized by law. Congress alone can make appellee a retired soldier of the Army of the United States. The decision of the Comptroller General, however, does not affect the status of petitioner so far as the retirement order is concerned, and that question need not be passed on. The Comptroller General's action affects merely his right to retired pay, and that depends upon whether Congress has provided the right to such retired pay and has made an appropriation accordingly. As to that the Comptroller General, in his capacity as head of the accounting office of the Government, has the right of determination, for it is unlawful for any sum to be paid out of the Treasury of the United States except according to law, and the duty of the Comptroller General is primarily to determine that question. We think it is a misconception, therefore, to say that because of the retirement order of the Secretary the question of appellee's status may not be inquired into, and we think in the circumstances we have shown, the Comptroller's decision was binding until reversed or set aside by a proper proceeding in a court having jurisdiction of the controversy and of the parties, and we do not think this is such a proceeding. Denby v. Berry, 263 U. S. 29; Lisle v. Lynch, 137 U. S. 280.

The decree of the lower court will be reversed and the cause remanded with instructions to dismiss the bill.

Reversed.

A true copy. Teste:

——— ———, Clerk Court of Appeals, D. C.

Monday, June 26th, A. D. 1933.

* * * * * * *

No. 5871, April Term, 1933

J. Raymond McCarl, as Comptroller General of the United States, and Frederickk W. Coleman, as Chief of Finance, United States Army, Appellants,

vs.

Santos Miguel

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed and that this cause be and the same is hereby remanded to the said Supreme Court with instruction to dismiss the bill.

Per Mr. Justice Groner, June 26, 1933.

Mr. Justice Robb took no part in the consideration or decision of this case.

In the Court of Appeals of the District of Columbia

No. 5871

J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. Army, Appellants,

v.

Santos Miguel, Appellee

Appellee's Motion for Leave to Withdraw Motion to Extend Time for Filing Motion for Rehearing and for Stay of Mandate

Now comes the appellee in the cause herein, by his attorney, and asks leave of the Court to withdraw his motion

filed herein July 14, 1933, to extend the time for filing a motion for rehearing of this cause.

He now represents to the Court that it is his purpose to apply to the Supreme Court of the United States for a writ of certiorari for the review of the judgment herein entered on June 26, 1933.

Wherefore he moves the Court that issuance of the mandate in the cause herein be stayed pending the decision of the Supreme Court on his application for the said writ of certiorari as authorized by statute (28 U. S. C. §350).

Burr Tracy Ansell, Attorney for Appellee.

Service of copies of the foregoing motion acknowledged this 21st day of July, 1933.

Leo A. Rover, U. S. Attorney, for Appellant.

[Endorsed:] In the Court of Appeals of the District of Columbia. No. 5871. J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. A., appellants, v. Santos Miguel, Appellee. Appellee's motion for leave to withdraw motion to extend time for filing motion for rehearing and for stay of mandate. Court of Appeals, District of Columbia. Filed Jul. 31, 1933. Henry W. Hodges, Clerk.

Tuesday, August 8th, A. D. 1933.

* * * * * * *

No. 5871

J. Raymond McCarl, Comptroller General, et al., Appellants,

vs.

Santos Miguel

On consideration of appellee's motion for leave to withdraw request for extension of time to ask for rehearing, and for stay of mandate, It is ordered that the motion to withdraw be and it hereby is granted, and it is further ordered that the mandate herein be and it hereby is stayed for 30 days from today under Rule 24.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5871

J. RAYMOND MCCARL, Comptroller General, and FREDERICK W. COLEMAN, Chief of Finance, U. S. Army, Appellants,

v.

SANTOS MIGUEL, Appellee

DESIGNATION OF RECORD

The Clerk in the preparation of the transcript of the record on petition for certiorari to the Supreme Court of the United States will include therein the following papers and proceedings, to wit:

1. The record.
2. Argument of the cause.
3. Opinion of the Court.
4. Judgment.
5. Motion to stay mandate.
6. Order staying mandate.
7. This designation.

Burr Tracy Ansell, Attorney for Appellee.

(Endorsed: No. 5871. J. Raymond McCarl, Comptroller General, et al., vs. Santos Miguel. Designation of Record. Court of Appeals, District of Columbia. Filed Aug. 29, 1933. Henry W. Hodges, Clerk.)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 41, inclusive, constitute a true copy of the transcript of record and proceedings in the Court of Appeals, as designated by counsel, in the case of J. Raymond McCarl, as Comptroller General of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army, appellants, vs.

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Santos Miguel, No. 5871, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 30th day of August, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, by Moncure Burke, Deputy Clerk. (Seal Court of Appeals, District of Columbia.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,038. District of Columbia Court of Appeals. Term No. 435. Santos Miguel, petitioner, vs. J. Raymond McCarl, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, United States Army. Petition for writ of certiorari and exhibit thereto. Filed September 6, 1933. No. 435, O. T., 1933.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1950

No. 435

SANTOS MIGUEL, *Petitioner*,

v.

J. RAYMOND McCARL, *Comptroller General of the United States*

and

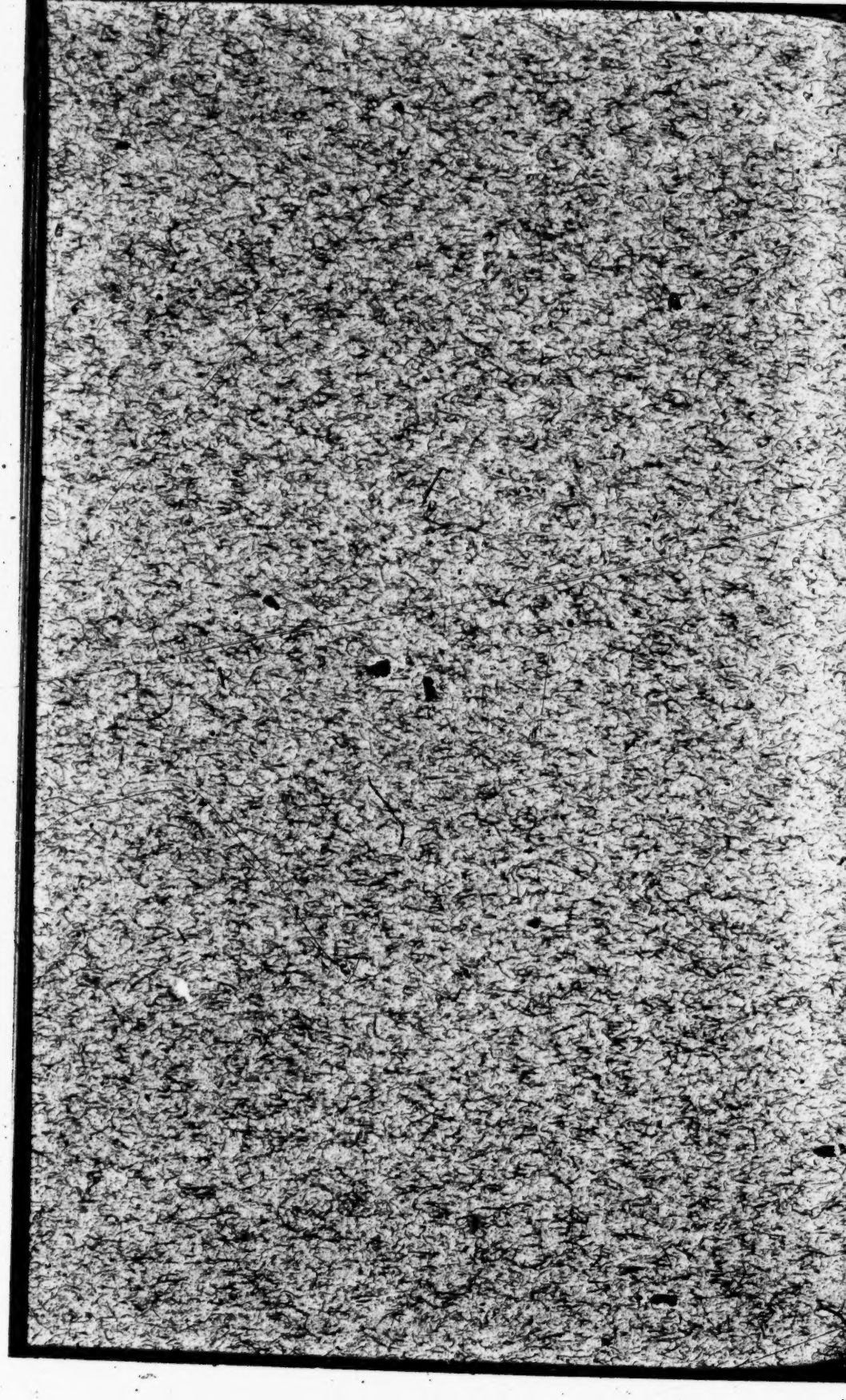
FREDERICK W. COLLMAN, *Chief of Finance, United States Army, Respondents*.

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia, and Brief in Support Thereof

SAMUEL T. ANSELL,
GEORGE M. WILKEYE,
Attorneys for Petitioner.

BURR TRACY ANSELL,
Of Counsel,
835 Transportation Building,
Washington, D. C.

Press of Byron S. Adams, Washington, D. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.

SANTOS MIGUEL, *Petitioner*,

v.

J. RAYMOND MCCARL, *Comptroller General of the United States*

and

FREDERICK W. COLEMAN, *Chief of Finance, United States Army, Respondents*

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Santos Miguel, prays a writ of certiorari to review the final judgment of the Court of Appeals of the District of Columbia in this case, entered June 26, 1933, reversing a judgment of the Supreme Court of the District of Columbia entered September 16, 1932.

QUESTIONS PRESENTED

1. Has the Comptroller General of the United States jurisdiction to review the order of the President acting through the Secretary of War, retiring with pay, after thirty years' service as an enlisted man of the United States Army, a Philippine Scout enlisted in the Army under section 36 of the act of February 2, 1901, 31 Stat. 757?

2. If the Comptroller General has jurisdiction to review such order of the President, is the right of an enlisted man of the Philippine Scouts, after thirty years' service, to retirement with pay so clear as to render the decision *contra* of the Comptroller General subject to correction by mandatory injunction?

The Supreme Court of the District of Columbia failed to answer question 1, but answered question 2 (in effect) in the affirmative and enjoined the Comptroller General against interfering with payment to the petitioner of retired pay as established by the Secretary of War. (R. 8-9, 25-26.) Upon appeal therefrom, the Court of Appeals of the District of Columbia inferentially answered question 1 in the affirmative and question 2 in the negative and, reversing the decree of the Supreme Court, directed that the petitioner's bill be dismissed (R. 39).

Petitioner contends that the answer to question 1 should have been that the Comptroller General had no power to review the order of the President, which would have made answer to question 2 unnecessary. But, plaintiff contends further that, even though the answer to question 1 be that the Comptroller General did have power to review the order of the President, the answer to question 2 should have been that the right of such enlisted member of the Philippine Scouts to retirement with pay is so clearly authorized under the statutes and applicable executive circular that the decision *contra* of the Comptroller General was arbitrary, capricious and unreasonable and therefore subject to correction by mandatory injunction.

STATUTES, EXECUTIVE CIRCULAR AND WAR DEPARTMENT SPECIAL ORDER INVOLVED

A. *Statutes:*

(1) The act of March 2, 1907, 34 Stat. 1217, provides:

> "When an enlisted man shall have served thirty years either in the Army, Navy or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *; *Provided*, That in computing the necessary thirty years, all service in the Army, Navy or Marine Corps shall be credited."

This act is, for the purpose of this cause, a reenactment of the act of February 14, 1885, 23 Stat. 305, which is set out in the appendix (Appendix, *infra*, p. 29).

(2) Section 36 of the act of February 2, 1901, 31 Stat. 757, provides:

> "That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands *for service in the Army*, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, *for the Regular Army*. The President is further authorized, in his discretion to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, *together with such native force*, shall not exceed at any one time one hundred thousand.
>
> * * * * * * * * *
>
> "The pay, rations, and clothing allowance to be authorized for the enlisted men shall be fixed by the Sec-

retary of War, and shall not exceed those authorized for the Regular Army." (Italics supplied.)

(3) The act of May 10, 1926, 44 Stat. 496, amended section 36, *supra*, as follows:

"The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War, and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army."

(4) Sections 1 and 2 of the National Defense Act of June 3, 1916, as amended by the act of June 4, 1920, 41 Stat. 758, provide:

"Sec. 1. That the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps.

"Sec. 2. COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States shall consist of the Infantry, the Cavalry * * *; *the officers and enlisted men of the retired list;* and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed two hundred and eight thousand, *including the Philippine Scouts.*" (Italics supplied.)

(5) The Army Appropriation Act of February 12, 1925, 43 Stat. 892, 895, (in force when the act of May 10, 1926, (3) *supra,* was passed) provides in pertinent part as follows:[1]

[1] Similar appropriation "for pay of retired enlisted men" appears in every annual Army Appropriation act since 1887 to date.

"PAY, AND SO FORTH, OF THE ARMY

* * * * * * * * * *

PAY OF PERSONS WITH RETIRED STATUS:

* * * * * * * * *

For pay of retired enlisted men, $8,028,925.

* * * * * * * * *"

(6) The act of June 4, 1920, 41 Stat. 766, provides:

"The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage for officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War."

(7) The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23, 24, provides as follows:

"Sec. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. * * *

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discon-

tinued, except as to settlements made before July 1, 1921.

Sec. 305. Section 236 of the Revised Statutes is amended to read as follows:

> 'Sec. 236. All Claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.' "

(8) Section 8 of the Act of July 31, 1894 (The Dockery Act), 28 Stat. 208, provides:

> "Disbursing officers; or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement."

B. *Executive Circular:*

Paragraph II, War Department Circular No. 41, issued September 21, 1931, reads as follows:

> "*Retired pay and allowances of Philippine Scouts.*—Under the provisions of the act of February 2, 1901, as amended by the act of May 10, 1926 (44 Stat. 406), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:
>
> 1. *Pay.*—Seventy-five per cent (75%) of the base pay and the longevity pay received by them on the active list at the time of their retirement.
>
> 2. *Allowances*—
>
> a. Six dollars and thirty-five cents ($6.35) per month in lieu of rations and clothing, and
>
> b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat and light. (A. G. 220.85 (4-3-31)"

C. *War Department Special Order:*

"35. Master Sergeant Santos Miguel, P-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600 A 211-2 (A. G. 220.85.) (4-3-21)

"By order of the Secretary of War.

"DOUGLAS MACARTHUR,
"General,
"Chief of Staff"

STATEMENT

Petitioner, Santos Miguel, first enlisted October 1, 1901, in the United States Army under the act of February 2, 1901, *supra*, p. 3, authorizing the President in his discretion to "enlist natives * * * for service in the Army", and was assigned to the Philippine Scouts. He reenlisted in the Army from time to time upon the expiration of his various enlistments until he had served continuously in the Philippine Scouts more than thirty years. Thereafter, upon his written application to the President (R. 4-2), he was placed upon the retired list by order of the Secretary of War, October 31, 1931, *supra*, p. 7, under the provisions of the act of February 14, 1885, as reenacted and amended by the act of March 2, 1907, *supra*, p. 3, with pay as fixed by the Secretary of War under the act of May 10, 1926, *supra*, p. 4.

Petitioner presented his retired pay voucher for the month of November, 1931, correct and in accord with the rates so fixed (War Department Circular No. 41, *supra*, p. 6), to his proper disbursing officer at Manila for payment (R. 2). The disbursing officer, instead of honoring the voucher and paying petitioner the retired pay and allowances shown due him thereby, addressed a letter dated November 5, 1931, to the Comptroller General, stating that he had reasonable doubt as to the authority in the Secre-

tary of War to retire petitioner or to fix his retired pay and allowances (R. 12).

The Comptroller General on January 19, 1932, rendered his "advance" decision to petitioner's disbursing officer holding that "*the retirement of enlisted men of the Philippine Scouts is not authorized by the remotest implication of the laws*" and that, accordingly, payment was not authorized. (R. 18-22.) On April 27, 1932, the petitioner began this action in the Supreme Court of the District of Columbia.

OPINION AND JUDGMENT OF THE SUPREME COURT

On June 10, 1932, the respondents having moved to dismiss petitioner's bill and after oral argument by petitioner's present counsel and by attorneys of the General Accounting Office for the Comptroller General and by an officer of the Judge Advocate General's Department, United States Army, for the Secretary of War as *amicus curiae*, Mr. Justice Adkins overruled the motions to dismiss holding that: (1) Enlisted men of the Philippine Scouts are members of the United States Army and eligible to retirement as such; plaintiff was, therefore, lawfully retired by appropriate order of the Secretary of War October 31, 1931; (2) plaintiff being a retired enlisted man of the Army, the appropriation "for the pay of retired enlisted men" was available to pay him; (3) The duty of payment was ministerial and the court had authority to compel its performance. (R. 8-9.)

Thereafter respondents filed separate answers to petitioner's bill (R. 9-18). On July 16, 1932, Mr. Justice Letts sustained petitioner's motion to strike the answers because "An examination * * * fails to disclose any issue of fact other than as raised by admitted facts. As to such issues, the law of the case was settled by Mr. Justice Adkins as shown by the memorandum filed herein on June 10, 1932" (R. 25). The respondents having elected to stand on the

record, on September 16, 1932, pursuant to stipulation, Mr. Justice Adkins entered a final decree of injunction as prayed by petitioner (R. 25-26). Respondents appealed therefrom to the Court of Appeals of the District of Columbia (R. 26).

OPINION AND JUDGMENT OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

By its opinion filed June 26, 1933, the Court of Appeals reversed the judgment of the trial court and remanded the cause with directions to dismiss the bill, holding by inference but without reasoning its conclusion, that the Comptroller General had jurisdiction to review the President's order herein; that he was required by law to render such decision, which was conclusive upon the executive; that said decision involved "the character of judgment or discretion" and was not subject to control by mandamus; and that petitioner's status being doubtful, his only remedy lay in the Court of Claims: the Court (Mr. Justice Groner) saying, *inter alia*:

> "* * * But where, in a case like this, there is in good faith a contest on the question whether petitioner is a retired soldier of the Army, or whether, even if he is, his right to pay is fixed by an appropriation with relation to enlisted men 'in the Army, Navy, or Marine Corps', or where, as in this case is stated under oath by the Comptroller, there are no funds available, it is clear, we think, that neither mandamus nor injunction should issue. * * *
>
> "Nor do we think the order of retirement directed by the Secretary of War is a conclusive finding of fact of the status of petitioner. So far as appears, it was a routine matter, but whether routine or not, it was effective only if authorized by law. Congress alone can make appellee a retired soldier of the Army of the United States. * * * We think it is a misconception, therefore, to say that because of the retirement order of the Secretary the question of appellee's status may

not be inquired into, and we think in the circumstances we have shown, the Comptroller's decision was binding until reversed or set aside by a proper proceeding in a court having jurisdiction of the controversy and of the parties, and we do not think this is such a proceeding."

The entire opinion appears in the Record at pages 32-38.

PETITIONER'S CONTENTIONS

(1) The petitioner contends, first, that the Comptroller General had no power to render any "decision" reviewing the order of the President retiring petitioner with pay. Retirement of Army personnel is a function of command, committed by the Constitution and the statutes to the President. Being so committed, and there being no provision for review of his decisions thereon, determination by the President of the eligibility of a member of the Army to retirement is final and conclusive against all executive officers of the Government, including the Comptroller General; and is not subject to review by the courts unless arbitrary, capricious or unreasonable. The Comptroller General is, then, without jurisdiction to go behind such determination of an enlisted man's eligibility to retirement, or to render nugatory the President's act done through his constitutional organ for military administration, the Secretary of War, in placing him upon the retired list.

(2) The petitioner contends *arguendo* that, even assuming that the Comptroller General acted within his jurisdiction in viewing said act of the President, his "decision" was arbitrary, capricious and unreasonable. Petitioner was an enlisted man in the United States Army. The statutes determining his status as such were so clear as to admit no other interpretation. Congress had appropriated money "for the pay of retired enlisted men" which was available to pay petitioner. A court of equity, upon arbitrary denial of such pay by the Comptroller General, has jurisdiction to grant relief by injunction.

REASONS FOR GRANTING THE WRIT

1. This case presents a basic and important question of federal administrative law which has never been decided by this court. The question stated generally is whether the Comptroller General, by refusing to approve payments incident to lawfully created status, may control the administration of government as undertaken by the President and the established executive departments within the scope of the authority conferred upon them by the Constitution and other laws of the land. More particularly presented, the question is, are the orders and decisions of the President as Chief Executive and Commander in Chief of the Army, through his *alter ego,* the Secretary of War, made within their proper legal competency, final and conclusive upon the Comptroller General? The War Department since 1789 has had entire control of the Army. The Secretary of War, as the representative of the President, has great and exclusive powers placed upon him by the Constitution. Now for the first time to permit an establishment which declares itself independent of and not responsible to the President, a mere accounting office, lacking all practical and judicial experience in military affairs, to overrule orders of the President intimately associated with his power of command of the Army; an office which presumes to override the decision of the Chief Executive and Commander in Chief as to the status in the Army of a component thereof, is a grave proposition so deviating from the uniform course of past decisions of this and other federal courts as to require examination by this Court before it be allowed to stand as established law. The Solicitor General recognized the gravity of this situation when he directed that there be appended to the brief of the Comptroller General in the court below his statement which reads in part as follows:

> *"The case is of importance in its relation to the respective powers of the Executive and Accounting Offices of the Government".* (Italics supplied.)

2. A paramount reason for allowing the writ of certiorari, however, is the extraordinary importance of the case as measured by its influence upon the national defense. Petitioner alleged that (R. 4) "the said unlawful interference of defendant, J. Raymond McCarl, has resulted and is resulting in irreparable injury to the plaintiff and so affects the important component of the Army to which plaintiff belongs as to do injury to the morale of said component of the Army and to embarrass military administration". The Chief of Finance, in his sworn answer, admits (R. 23): that there are a considerable number of enlisted men of Philippine Scouts who have completed, or are about to complete thirty years' service in the Army, and *that the decision rendered and position taken by defendant McCarl do and will injuriously affect the morale of a component part of the Army, to wit, the Philippine Scouts*". (Italics supplied.) In the exhaustive brief filed in the Court of Appeals by *amici curiae* representing the Secretary of War appears the following:

> "The War Department is gravely apprehensive of the effect of the advance decision of the Comptroller General upon the morale of the Philippine Scouts. * * * it is, perhaps, too much to expect that the accounting officers * * * will * * * appreciate the intense * * * pride of an Oriental people. The British failed in this respect until the Sepoy Mutiny of 1857 taught them to be wary. We should profit by their bitter lesson.
>
> * * * * * * * * * *
>
> "There is a greater, a more important consideration to the government than a mere sum of money. The morale of its troops upon its last frontier, and the keeping of the faith with these men who have upheld its hands for 30 years, are considerations * * * that must not be ignored.
>
> "These considerations * * * are urged as having the most important bearing upon the real interest of the United States, and as pointing the duty of the

court, when satisfied on the law, to act with firmness and celerity.

* * * * * * * * *

"*The principles involved in this case are vital to the War Department. They are vital to constitutional government* * * *". (Italics supplied.)

It is submitted that the court should grant *certiorari* in this case almost as a matter of course under paragraph 5c of Rule 38.

Petitioner respectfully urges that the questions presented should be finally settled and determined by this court, and prays that this petition be granted.

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BRIEF IN SUPPORT OF PETITION

OPINIONS

The memorandum opinions of the Supreme Court of the District of Columbia overruling respondents' motions to dismiss and sustaining petitioner's motion to strike respondents' answers, filed June 10 and July 16, 1932, respectively, are not published but appear in the record on pages 8-9 and 25.

The opinion of the Court of Appeals was filed June 26, 1933, and appears on pages 32-38 of the Record. It is not yet officially reported.

JURISDICTION

The jurisdiction of this Court to issue the writ of *certiorari* is invoked under section 240 (a) (c) of the Judicial Code of the United States as amended by the act of February 13, 1925, 43 Stat. 938.

QUESTIONS PRESENTED

These are stated in the petition, *supra*, p. 2.

STATEMENT

A statement of the case is included in the petition, *supra*, pp. 7-8.

ERRORS TO BE RELIED UPON AND SUMMARY OF ARGUMENT

These are set out under the headings, "Petitioner's Contentions" and "Reasons for Granting the Writ" in the petition, *supra*, pp. 10-13.

ARGUMENT

I

The retirement of the officer and enlisted personnel of the Army is a function committed by the Constitution and the other laws of the United States solely to the President as Chief Executive and Commander in Chief. The President's act in finding every necessary fact required by the statutes authorizing retirement and thereupon placing petitioner upon the retired list, being without fraud and neither arbitrary, capricious nor unreasonable, and there being no provision for its riview, is final and conclusive and binding upon the Comptroller General as upon all others.

Article II, section 2, clause 1, of the Constitution provides that, "The President shall be Commander in Chief of the Army * * * of the United States * * *." Article I, section 8, clause 14, empowers the Congress "to make rules for the government and regulation of the land * * * forces,". These powers are distinct, and Congress may not by rules and regulations impair the authority of the President as Commander in Chief. *Swain v. United States*, 28 Ct. Cl. 173, affirmed 165 U. S. 553. "The power to make the necessary laws is in Congress; the power to execute in the President. * * * But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President." *Ex parte Milligan*, 4 Wall. 2, 139.

On February 2, 1901, Congress enacted section 36 of the Army Reorganization Act, 31 Stat. 757, *supra*, pp. 3-4, authorizing the President to enlist Filipinos "for service in the Army". Enlistments thereunder began October 1, 1901, upon which day petitioner enlisted in the United States Army. When the act of February 2, 1901, *supra*, became law and when petitioner enlisted thereunder, the statute governing retirement of enlisted men was the act of February 14, 1885, 23 Stat. 305, as immaterially modified, *infra*, Appendix, p. 29. The 1885 act was reenacted

by the act of March 2, 1907, 34 Stat. 1217, *supra*, p. 3. Both acts provide, in substantially the same language, that when an enlisted man shall have served 30 years in the Army, he shall upon making application to the President, be retired with 75 per centum of his active pay and allowances. The 1907 reenactment has remained in force continuously to the present, and under its authority petitioner's retirement was ordered.

Both acts constitute exercise by Congress of its constitutional power (Article I, section 8, clause 14, *supra*) "to make rules for the government and regulation of the land * * * forces". Both provide, in accordance with Article II, section 2, clause 1, that their execution shall devolve upon the President. Thus, proper correlation between the two constitutional duties is preserved.

THE DECISIONS OF THIS AND OTHER FEDERAL COURTS

This Court has recognized that the power to retire personnel of the Army is in the President, Congress having established the machinery therefor. In *United States ex rel. French v. Weeks*, 259 U. S. 326, the Court considered the operation of section 24b of the act of June 4, 1920, 41 Stat. 759, providing for reduction of the Army by retiring unfit officers. This section, in effect, required that, after hearing by a court of inquiry the record thereof be forwarded to a Final Classification Board, and "the findings of said classification board shall be final and not subject to further revision *except upon the order of the President*". (Italics supplied.) This Court, in construing the words above italicized said (p. 333):

> "The exception, plainly enough, was inserted * * * as a congressional recognition of the right in him as the Chief Executive and Commander in Chief of the Army (*a right which he probably would have had without it*), to interfere in such cases at his option, * * *". (Italics supplied.)

The Court of Appeals of the District of Columbia has, too, construed a retirement statute practically identical with the act of March 2, 1907, *supra*, p. 3. In *United States ex rel. Moser v. Meyer*, 38 App. D. C. 13, the relator, an officer of the Navy, was retired under section 1443, Revised Statutes, which provided:

> "When any officer of the Navy has been forty years in the service of the United States he may be retired from active service *by the President upon his own application*". (Italics supplied.)

Relator was retired by the President with a lower rank than that to which he believed himself entitled. The Supreme Court of the District of Columbia refused mandamus to compel the Secretary of the Navy to place his name on the retired list with higher rank. The Court of Appeals affirmed this decision, holding (p. 19):

> "Whatever, if any, duty the Secretary of the Navy has about the matter of placing names upon the retired list, it is not that he himself shall settle the question of grade or retirement, but after a determination of those questions by the President, with whom they lie, to give effect to his directions, * * *".

Subsequently, the Court of Appeals denied relator's application for a writ of error to remove the case to this Court (39 App. D. C. 370) and said (p. 371):

> " * * * it was decided simply that the subject of retirement was committed to the President of the United States as Commander in Chief of the Army and Navy, * * *."

It must follow that petitioner was retired by order of the President acting as Chief Executive and Commander in Chief of the Army, executing the law made by Congress to govern the retirement of enlisted men.

As a necessary corrolary of the commitment of the retirement of enlisted men by the Constitution and statutes to the President, the President has final power to determine the existence of the facts prescribed by Congress as necessary for retirement in each case. No proposition of law is better settled than that where an officer is created by law an instrument of the executive to ascertain the existence or nonexistence of a factual situation and no provision is made for review thereof, the action of the officer, in the absence of fraud or such manifest mistake as to amount to caprice, is final. *United States v. Wright*, 11 Wall. 648; *Nishimura Ekiu v. United States*, 142 U. S. 651; *Kaoru Yamataya v. Fisher*, 189 U. S. 86. This accords with the salutary principle that, when a question has been constitutionally committed to an executive officer for final determination, his decision cannot be reversed by any other, court or executive officer. *Johnson v. Towsley*, 13 Wall. 72; *Lem Moon Sing v. United States*, 158 U. S. 538. And, as such determinations are unassailable by all, so they cannot be reviewed and reversed by the Comptroller General. *Wright v. Yuchausti & Co.*, 272 U. S. 640.

That the general powers of the Comptroller General to settle and adjust claims and demands, and to state conclusive balances do not vest him with jurisdiction to review decisions of a department head, done as the representative of the President and within his legal competency is definitely settled by the decisions of this and other federal courts. These two powers, the first vested in accounting officers by the act of March 3, 1817, 3 Stat. 366 (reenacted as section 236, R. S., and now section 305, Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23), and the second, by the act of March 30, 1868, 15 Stat. 54 (reenacted as section 191, R. S., and now included in section 304, Budget and Accounting Act, *supra*), are now in the Comptroller General by virtue of the first sentence of section 304 of the Budget and Accounting Act, 42 Stat. 20, 23.

As to the power to settle and adjust claims and demands, in the case of *United States v. Jones*, 18 How. 92, 96 (1855), holding that the Government could not recover back allowances paid defendant by the Secretary of the Navy, who had placed him on a special duty status entitling him thereto, but which had been disallowed by the accounting officers, this Court declared:

> "The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department * * *. His acts and decisions, in subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments*". (Italics supplied)

The quoted language was specifically reaffirmed by this Court in *United States v. Johnston*, 124 U. S. 236 (1888), denying mandamus against a treasury agent to compel recoupment of commissions paid him by the Secretary of the Navy under statutory authority, the Court saying that "In auditing these accounts they (the accounting officers) would have been bound to regard such action of the Secretary as final. *What was said in United States v. Jones, 18 How. 92, 96, may be repeated here* as applicable to accounts which have been finally acted upon by a head of department invested with authority * * *." (Italics supplied)

As to the power to state conclusive balances, the Court of Claims in *Billings v. United States*, 23 Ct. Cl. 166, held that accounting officers may not go behind orders of the Secretary of War directing travel, saying (p. 178): "It is not for accounting officers to inquire into the reasons, nor to take exception to * * * the orders of the President or a department head when issued within the general

scope of their authority", and that balances stated by the Comptroller are "not * * * conclusive upon the head of a department in the exercise of his discretion * * *".

This Court, in *United States v. Waters*, 133 U. S. 208, 215, adopting language of the Court of Claims, held that the Comptroller

> "has no power to review, revise or alter items * * * of expenditure or allowances made upon the judgment and discretion of other officers * * *. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances".

We therefore submit that it is settled law that the Comptroller General does not, under his general powers to settle and adjust claims and demands and to state balances, possess jurisdiction to go behind decisions of the President or department heads in matters committed to their several jurisdictions by the Constitution and the statutes. The Comptroller General, however, claims all-inclusive jurisdiction (6 Comp. Gen. 604, 606) by virtue of his power to make "advance decisions" under section 8 of the Dockery Act of July 31, 1894, 28 Stat. 208 (*supra*, p. 6).

The legislative history of this section (26 Cong. Rec. 4300) shows that its purpose was to legalize an existing practice, described by Attorney General Olney (20 Ops. Atty. Gen. 654), to enable disbursing officers and department heads to obtain from the Comptroller "pre-audits" of doubtful accounts, binding upon the auditors. Its scope is precisely co-incident with the Comptroller's power to settle and adjust claims and demands. It does not extend his jurisdiction, but relates solely to the time of its exercise; it permits him to decide in advance of payment only such questions as he might decide after payment. It does not purport to vest him with power to review *competent decisions* of the President or the heads of departments.

Smith v. Jackson, 241 F. 747, affirmed 246 U. S. 288, is the final authority upon this subject. The relator, then judge for the District Court of the Canal Zone, petitioned that court for mandamus against the Auditor, to compel payment of his compensation as fixed by law. The Auditor responded that he had received from the Comptroller of the Treasury an "advance decision" under section 8 of the Dockery Act, adverse to the relator, which precluded action by the court. Judge Clayton, in an opinion adopted by the Circuit Court of Appeals as its own, and which received the commendation of this court, said:

> "The salary of a judge who has served and for whose compensation specific appropriation has been made is not such a claim that affords any field for the operation of the Dockery Act."

OPINIONS OF THE ATTORNEY GENERAL

The pertinent views of the Attorneys General are all to the same effect. From the opinion of Attorney General Crittenden to the Secretary of War (5 Ops. Atty. Gen. 286) to the latest expression of that office, the opinion of Acting Attorney General Biggs to the Secretary of War, August 8, 1933, there is no deviation from the conclusion that accounting officers may not review the decision of the President or a department head in a matter committed to his jurisdiction. Almost the last official act of Attorney General Mitchell was to address the Secretary of Agriculture in a personally prepared opinion (37 Ops. Atty. Gen. 95-100, March 1, 1933) in which, citing the decision of this court in *Wright v. Ynchausti & Co.,* 272 U. S. 640, Mr. Mitchell said:

> "This decision confirmed the view previously taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts the Comptroller Gen-

eral cannot go beh[illegible] findings and decisions of the heads of the executi[illegible] departments in matters specially entrusted to their judgment by statute."

To the same effect are the several opinions of Attorney General Stone reported in 34 Ops. Atty. Gen. at pages 5, 162, 250 and 311. And as directly bearing upon the subject we cite 28 Ops. Atty. Gen. 181 (Wickersham) and 7 Ops. Atty. Gen. 453 (Cushing).

We submit, therefore, in holding that in such a case as this, the Comptroller General, when applied to, was required by law to review the act of the President, and that his decision was conclusive upon the executive, the Court of Appeals erred; that the law as established by the decisions of this Court, as set forth above, is precisely to the contrary, and that the Comptroller General was without jurisdiction to review the President's act retiring petitioner with pay.

II

The President's construction of the pertinent statutes resulting in his order retiring petitioner was clearly correct and, assuming for argument only that the Comptroller General acted within his jurisdiction in deciding that "the retirement of enlisted men of the Philippine Scouts is not authorized by the remotest implication of the laws", his decision was arbitrary, capricious, and unreasonable.

From the date of petitioner's original enlistment October 1, 1901, to that of the order of his retirement, October 31, 1931, the Philippine Scouts had been held by Congress, the War Department, and the accounting officers, including the Comptroller General, as a component part of the Regular Army.

The very act of February 2, 1901, *supra*, p. 3, section 36 of which provided for the creation of the Philippine Scouts, defined the organization as part of the Army. Section 1 of the act, 31 Stat. 748, provides:

"That from and after the approval of this Act *the Army of the United States,* including the existing organizations shall consist of * * * such other officers and enlisted men as may *hereinafter* be provided for: * * *." (Italics supplied.)

The act of May 16, 1908, 35 Stat. 163, provided that "the office of captain in the Philippine Scouts is hereby created as a grade of rank in the military establishment."

The National Defense Act of June 3, 1916, 39 Stat. 166 (Appendix, p. 29), specifically named the Philippine Scouts as part of the Regular Army, grouping them with the enlisted men of the Quartermaster Corps, the Medical Department, the Signal Corps and the unassigned recruits, all of whom were then and are now component parts of the Regular Army.

The act of June 4, 1920, 41 Stat. 758 (*supra,* p. 4) likewise names the Philippine Scouts as a part of the Regular Army, providing that "the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, *including the Philippine Scouts*".

The War Department has always held the Philippine Scouts a component part of the Regular Army:

1. In 1903 Elihu Root, then Secretary of War, so held in a ruling to the Bureau of Pensions, following which that Bureau has ever since paid pensions to Philippine Scout veterans as soldiers of the Regular Army.

2. Article 77 of the Articles of War (Military Code of 1874), section 1342, Revised Statutes, made officers of the Regular Army ineligible to sit on courts-martial to try officers or soldiers of other forces, except marines detailed with the Army. The War Department (Judge Advocate General) held officers of the Regular Army eligible to sit upon courts-martial to try members of the Philippine Scouts. C. 19272, C. 26772, Dig. Ops. J. A. G. (1912), 86, 1508.

3. The act of August 29, 1916, 39 Stat. 650, repealed the 1874 Code referred to above. Article 2 of the Code of

August 29, 1916, defined the persons subject to military law as (1) the officers and soldiers of the Regular Army; (2) cadets; (3) the officers and soldiers of the Marine Corps serving with the Army; (4) retainers to the camp; (5) persons under sentence of courts-martial; and (6) inmates of the Regular Army Soldiers' Home. This Code was superseded by that of June 4, 1920, 41 Stat. 787, which made no change in the definition of persons subject to military law except to add to (1), nurses, warrant officers and field clerks. Every military trial of members of the Philippine Scouts since 1917, of which there have been hundreds, has been had under the provisions of these Codes. Unless the Scouts are included in (1) as "officers and soldiers of the regular Army", they are not included at all and every trial so had has been illegal.

4. The Judge Advocate General of the Army has uniformly held the Philippine Scouts part of the Regular Army: Dig. Ops. J. A. G. (1906), 84; (1911) 158; (1911) 442; opinion dated May 15, 1929, approved by the Secretary of War; opinion dated October 17, 1930, approved by the Secretary of War; memorandum dated February 1, 1932, examining exhaustively all the authorities.

The Comptroller General himself in 3 Comp. Gen. 132, 135, held:

> "The Philippine Scouts, except as they are a part of the Regular Army, are not a component of the Army of the United States; and *the conclusion is irresistible that they are a part of the Regular Army,* * * *". (Italics supplied).

In his decision of January 31, 1925, A-6560, unreported, and again, in 4 Comp. Gen. 82, 83, he reiterated that:

> *"The Philippine Scouts are a part of the Regular Army* * * *."

The Director of Pensions, Veterans' Administration under date of May 24, 1932, notified The Adjutant General of the Army that enlisted men of the Philippine Scouts:

> "have consistently been recognized as having pensionable status as a part of the Regular Army * * *."

The only court ever passing directly upon the question, the Supreme Court of the Philippine Islands, held, in *Atkinson v. Stewart*, 23 Phil. 405, that the Philippine Scouts are a part of the Regular Army.

The enlisted men of the Philippine Scouts have, since October 1, 1901, been uniformly paid from the appropriation "*Pay of the Army*", and are now paid therefrom. From October 1, 1901, to June 30, 1902, the item applied to their pay was "for the pay of enlisted men", from which they in common with all other enlisted men of the regular army were paid with the approval of the accounting officers. Since June 30, 1902, the appropriation acts have provided for their pay, and that of other enlisted men of the Army, in separate items, a device frequently adopted by the Congress, in appropriating for the Army, to limit the maximum strength of specified organizations. Their allowances, however, which correspond in nature and kind with those of other soldiers of the Regular Army, have always been and are now paid from general appropriations applicable to enlisted men of the Army.

Never until the Comptroller General's advance decision of January 19, 1932 (R. 18-22) had it ever been questioned in theory or in practice that the Philippine Scouts were a part of the Army. All authorities were to one effect: the Philippine Scouts are a part of the Army. As such part of the Army, the enlisted members thereof are clearly entitled to retirement under the act of March 2, 1907, *supra*, p. 3, providing for the retirement with pay of enlisted men of the Army.

It should not be forgotten that military retirement causes no separation from the service, but a mere change in a continuing military status. Both the officers and enlisted men of the retired list, by the terms of section 2, act of June 4, 1920 (*supra*, p. 4), remain part of the Regular Army, subject to recall. The Comptroller General has even held (1 Comp. Gen. 700) that retired enlisted men hold office; and undoubtedly they hold positions of indefinite duration with pay attached.

It is idle to say, as the Court of Appeals seems to do, that the Comptroller General's decision did not affect petitioner's retired status, but only his right to retired pay. That "pay follows status" is almost a maxim. *Glavey v. United States*, 182 U. S. 595; *Whiting v. United States*, 35 Ct. Cl. 291, 301. If petitioner was retired at all, he was retired with pay, for, as this court said in *Denby v. Berry*, 263 U. S. 29, 35, construing Navy statutes similar to that involved here, "to be retired from active service under the * * * sections, *means retired with pay* and has had this meaning for many years." Retirement of enlisted men without pay is a thing unknown; and to hold an appropriation "for the pay of retired enlisted men" inapplicable to the pay of a retired enlisted man, is arbitrarily to thwart the plain terms of the law.

It is submitted, therefore, that the Comptroller General's decision on the merits and his position that no appropriation is available, is arbitrary, capricious, and unreasonable.

III

Petitioner's only plain and adequate remedy is in equity against the Comptroller General.

It has often been held that the superior courts of the District of Columbia have equitable jurisdiction to restrain the acts of officers of the United States in excess of their authority. *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *School of Magnetic Healing v. McAnulty*, 187 U. S. 94;

Bates & Guild Co. v. Payne, 194 U. S. 106; *Smith v. Hitchcock*, 266 U. S. 53; *McCarl v. Cox*, 8 F. (2d) 669; *McCarl v. Pence*, 18 F. (2d) 809. And these courts have continuously since their creation in 1801 had the power to compel a United States officer to perform a ministerial act. *Decatur v. Paulding*, 14 Pet. 497; *Cox v. United States ex rel. McGarrahan*, 9 Wall. 298; *United States ex rel. McBride v. Schurz*, 102 U. S. 378.

It may be that petitioner might maintain suit in the Court of Claims, wherein the Court of Appeals has held lies his only remedy, but such remedy would be neither plain nor adequate. "The objection, that there is a remedy at law, is only available where such remedy is as plain, adequate and effectual as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 214." *Sullivan v. Portland and Kennebec R. R. Co.*, 94 U. S. 806.

Petitioner's remedy in the Court of Claims is not plain. This Court said on May 29, 1933, in *Williams v. United States*, No. 728, reported in 77 S. Ct. 965 (advance sheets) that (p. 968):

> "It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and conclusive of the rights of the parties unless a new trial be granted by that court as provided by law."

This is undoubtedly the law. Yet, neither the Court of Claims nor any other court can enforce a judgment against the United States, however binding it may be; it is obvious that a writ of execution will not lie against the government nor can the Congress be compelled to appropriate to pay a judgment. The authors of this brief invite attention to the judgment of the Court of Claims in the case of *Dalton v. United States*, 71 Ct. Cl. 421, in which they represented the plaintiff, and payment of which, although twice regularly certified to Congress, has been denied up to the present time.

Petitioner's remedy in the Court of Claims is not adequate. That court has jurisdiction only to render money judgments. *United States v. Alire,* 6 Wall. 573. It could not, as the Supreme Court of the District can, compel payment of a judgment in petitioner's favor out of the appropriation made and available to pay him. Assuming petitioner successful in an action before the Court of Claims, the court could give judgment only up to the date the judgment might be rendered, and his right to receive pay in the future would depend upon successive suits for such pay as had accrued following the latest judgment in his favor: and for satisfaction of each such judgment, petitioner must await appropriation *at the will of Congress.*

Judge Jackson in *Smith v. Jackson, supra,* p. 21, had an alternative remedy by suit in the Court of Claims, but that fact did not oust the jurisdiction of the District Court of the Canal Zone to grant mandamus.

Petitioner submits that the Supreme Court of the District of Columbia has equitable jurisdiction of this case regardless of whatever right he may have in the Court of Claims.

CONCLUSION

For the reasons above set forth we respectfully submit that the writ of certiorari should be granted.

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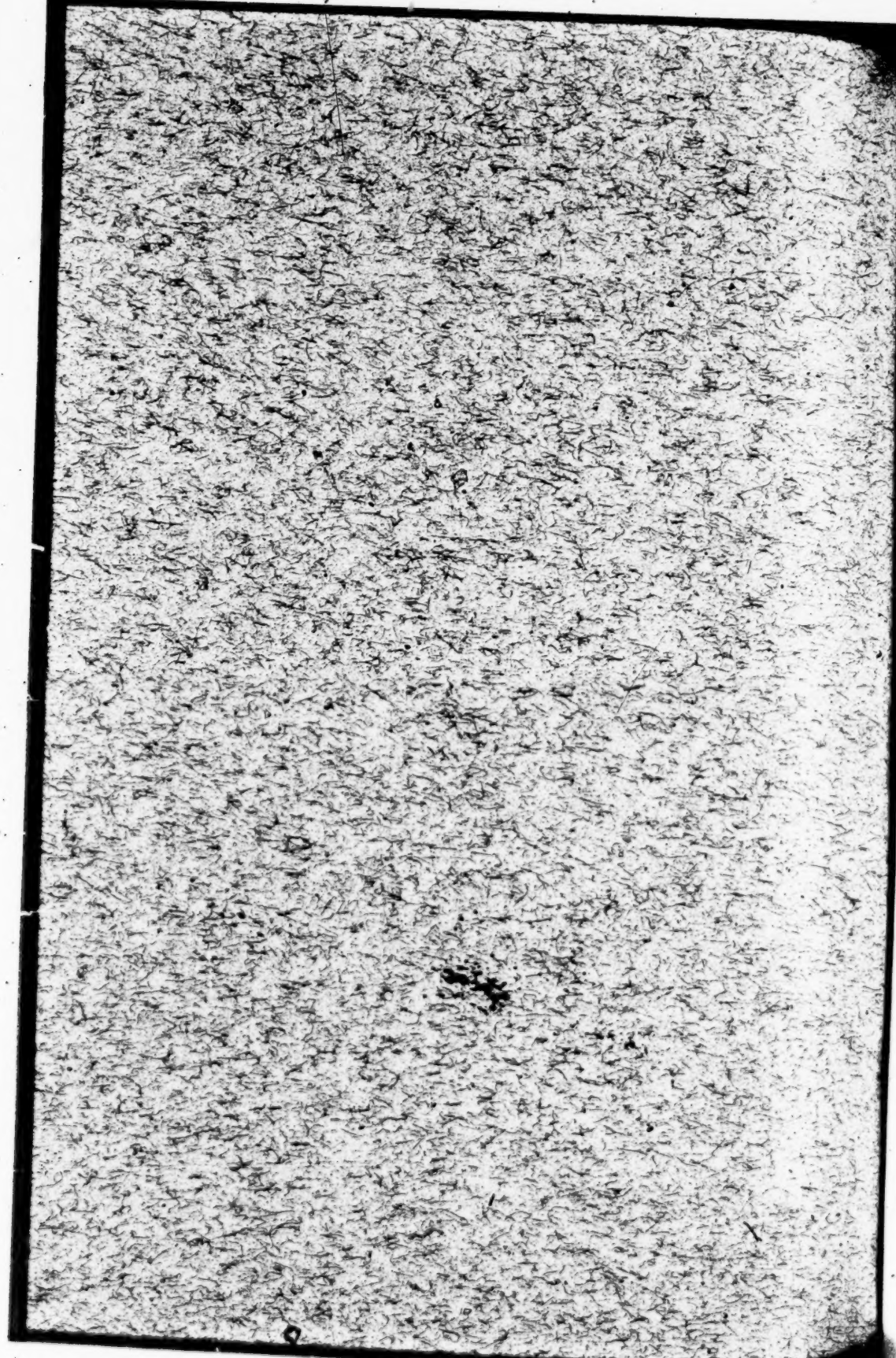
APPENDIX

The act of February 14, 1885, 23 Stat. 365, provided as follows:

> "That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as a private or non-commissioned officer, or both, he shall, upon making application to the President, be placed upon the retired list, with the rank held by him at the date of retirement: and he shall thereafter receive 75 per centum of the pay and allowances of the rank upon which he was retired."

The National Defense Act of June 3, 1916, 39 Stat. 166, provided:

> "That *the Army of the United States shall consist of* the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and *such other land forces as are now or may hereafter be authorized by law.*
>
> "Sec. 2. COMPOSITION OF THE REGULAR ARMY.—*The Regular Army of the United States, including the existing organizations,* shall consist of * * * (various organizations are enumerated, but the Philippine Scouts are not mentioned) * * * *such other officers and enlisted men as are now or may be hereafter provided for: Provided,* That hereafter the enlisted personnel of all organizations of the Regular Army shall at all times be maintained at a strength not below the minimum strength fixed by law: *Provided further,* That the total enlisted force of the line of the Regular Army, excluding *the Philippine Scouts and the enlisted men of the Quartermaster Corps, of the Medical Department, and of the Signal Corps, and the unassigned recruits,* shall not * * * exceed one hundred and seventy-five thousand men: * * * (Italics supplied.)



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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 435.

SANTOS MIGUEL, *Petitioner*,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States, and FREDERICK W. COLEMAN, Chief of Finance, United States Army.

BRIEF ON BEHALF OF PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 435.

SANTOS MIGUEL, *Petitioner*,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States, and FREDERICK W. COLEMAN, Chief of Finance, United States Army.

BRIEF ON BEHALF OF PETITIONER.

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW.

The memorandum opinions of the Supreme Court of the District of Columbia overruling Respondents' motions to dismiss and sustaining Petitioner's motion to strike Respondents' answers, filed June 10th and July 16th, 1932, respectively are not reported but appear in the record, pages 10, 33. The final decree entered therein appears in the record at page 33.

The opinion of the Court of Appeals was filed June 26, 1933, and is reported in 66 Fed. (2d) 564. See also record, pages 42-48.

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was rendered on June 26, 1933 (R. 42-48; 66 Fed. (2d) 564). The petition to this Court for Writ of Certiorari was filed September 6, 1933. Certiorari was granted October 23, 1933. The Writ was issued by this Court under Section 240 (a) (c) of the Judicial Code of the United States as amended by the Act of February 13, 1925, 43 Stat. 938.

THE QUESTIONS PRESENTED.

These are fully set out in the Petition for Writ of Certiorari to the Court of Appeals, filed herein September 6, 1933, on page 2.

STATUTES, EXECUTIVE CIRCULAR AND WAR DEPARTMENT SPECIAL ORDER INVOLVED.

These likewise are set forth *in extenso* on page 3 *et seq.* of the Petition for Writ of Certiorari filed herein.

STATEMENT OF CASE.

This is a personal action against J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. Army, by bill in equity, brought by an enlisted man of that part of the United States Army known as the Philippine Scouts, who has been placed upon the retired list by the President acting through the Secretary of War, seeking a mandatory injunction to compel payment of retired pay withheld because of an advance decision of the Comptroller General, holding that petitioner was not lawfully entitled to retirement. It is not an action against the United States. *Rolston v. Mo. Fund Commrs.*, 120 U. S. 390, 411. The Supreme Court of the District of Columbia granted the relief prayed; the defendants appealed, and the Court of Appeals, D. C., reversed the judgment. Thereafter, upon the petition of the plaintiff, in

effect joined in by the Solicitor General though opposed by the Comptroller General, this court granted the prayer of the petition and ordered the writ of certiorari to issue.

On the third day of April, 1931, petitioner, a Philippine native, made his application in writing to the President of the United States, asking that he be placed upon the retired list provided by law for enlisted men of the army after completion of thirty years' service.

The record of petitioner's service in the Army as furnished by the Adjutant General of the Army from the official records of the War Department to the Chief of Finance, and by him to the Comptroller General (transcript of record, printed pages 13-14), shows said service to have been in the Philippine Scouts, and continuous since October 1, 1901. He therefore completed thirty years' service as an enlisted man September 30, 1931. Accordingly, his retirement as an enlisted man of the Army was, on September 3, 1931, announced in War Department Special Orders, to be effective October 31, 1931, the effective date being fixed ahead to permit transmittal of the order to the Philippine Islands.

Enlistment of Philippine natives in the United States Army was authorized by Congress upon the recommendation of President McKinley, as contained in his message of December 3, 1900, by Section 36 of the Act of February 2, 1901, 31 Stat. 757, as follows:

> SEC. 36. That when in his opinion the conditions in the Philippine Islands justify such action *the President is authorized to enlist natives of those islands for service in the Army*, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number

> of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand. (Italics supplied)

Petitioner first enlisted under the provisions of the foregoing statute, October 1, 1901, and was assigned to the 17th Company of Philippine Scouts. Thereafter, he entered into ten other and subsequent enlistments, rising, during his continuous service of more than thirty years, from private to master sergeant, the highest enlisted grade, in which he was retired October 31, 1931. In each of his eleven enlistments, he made the same sworn declaration required of every other soldier upon his enlistment in the Army, took the same oath, and was recruited and examined, like every other soldier, by authorized recruiting officers of the United States Army.

Petitioner was placed on the retired list by virtue of the provisions of the Act of March 2, 1907, 34 Stat. 1217, in substance and effect a mere reenactment of the Act of February 14, 1885, 23 Stat. 305, the retirement law in effect at the time of the organization of the Philippine Scouts under the Act of February 2, 1901. The pertinent part of the Act of March 2, 1907, *supra*, under which Miguel was retired, is as follows:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, *upon making application to the President*, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *.

The remainder of the section, which deals with the money values of the several allowances to which enlisted men in general are entitled upon retirement, is omitted for the reason that both the active and retired pay and allowances of enlisted men of the Philippine Scouts are governed by a

special statute, to wit, section 36 of the Act of February 2, 1901, 31 Stat. 757, as amended by the Act of May 10, 1926, 44 Stat. 496. Section 36, as originally enacted, provided *inter alia* that:

> * * * The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army.

Travel pay not having been specifically mentioned, the Comptroller General, in a decision of August 21, 1922 (A. D. 6890), held travel pay not payable to these enlisted men. Thereupon, at the request of the War Department, the Congress amended Section 36 by providing, in the Act of May 10, 1926, 44 Stat. 496, that:

> The *pay and allowances of whatever nature and kind* to be authorized *for the enlisted men* of the Philippine Scouts *shall be fixed by the Secretary of War* and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * *. (Italics supplied.)

At the time of this enactment, retired pay and allowances constituted, and for many years had constituted, one of the kinds or classes of pay authorized for enlisted men of the regular army.

Enlistment of Philippine natives under the Act of February 2, 1901, did not begin until October 1, 1901. Therefore, no enlisted man of the organization could complete thirty years' service until September 30, 1931, and there was no occasion for the Secretary of War to exercise the power delegated to him by the Act of May 10, 1926, and to fix rates of retired pay and allowances for these enlisted men until the first eligible had nearly completed thirty years' service. The power was exercised, however, on September 21, 1931, when, pursuant to the provisions of the act, the Secretary of War, by War Department Circular No. 41, fixed the pay and allowances for the retired enlisted

men of the Philippine Scouts. The rates thus provided are, as to pay, 50 per cent, and as to allowances, about 75 per cent of the amounts authorized by law for other enlisted men of the army, as set out by amount in the Act of March 2, 1907.

Thereafter, a pay-roll voucher covering petitioner's retired pay and allowances for the month of November, 1931, correct and in exact accord with the rates as fixed by the Secretary of War in said Circular, was presented to the army disbursing officer at Manila, P. I., Major Stephen R. Beard. Major Beard, instead of honoring the voucher, on November 5, 1931 addressed a letter to the Comptroller General through the Chief of Finance, in which he stated that he, Major Beard, had reasonable doubt as to the authority of the Secretary of War to retire Miguel or to fix the rates of his retired pay and allowances. (See letter, transcript, p. 16.) In so doing, Major Beard undoubtedly believed such action proper under the provisions of section 8 of the Dockery Act of July 31, 1894, 28 Stat. 208. The Chief of Finance, without reference to the Secretary of War, forwarded the letter to the Comptroller General.

The Comptroller General on January 19, 1932, rendered to Major Beard his advance decision No. A-40048, in which, reviewing the acts of the President of the United States and the Secretary of War, in retiring Miguel and fixing the rates of his retired pay and allowances, he held enlisted men of the Philippine Scouts not eligible to retirement "by the remotest implication of the laws," and that Major Beard was therefore not authorized to pay the voucher, which would be retained by him. (R. 24-30.)

Thereafter, The Judge Advocate General of the Army, by direction of the Secretary of War, examined the advance decision of the Comptroller General, and the decision appearing to the War Department to be erroneous the Secretary of War on February 15, 1932, under Section 148 of the Judicial Code, referred the matter involved to the Court of Claims, requesting the decision of that court for his guid-

ance and action. No proceedings aside from the filing of the Secretary of War's letters and exhibits have been had in that reference, and petitioner never became party thereto. On the contrary, instead of consenting to the reference and filing petition in the Court of Claims, on April 27, 1932 he began this action.

On June 17, 1932, the date of the answer of the defendant Chief of Finance, there remained available and to the credit of the appropriation "Pay of the Army" for the fiscal year 1932, in the item "*for the pay of retired enlisted men*", approximately $402,000.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court of Appeals erred in holding inferentially that the Comptroller General had jurisdiction to review the order of the President, acting through the Secretary of War, placing the petitioner on the enlisted men's retired list of the Army with pay.

2. The Court of Appeals erred in holding and determining that the Comptroller General was required by law when applied to by a disbursing officer to decide the question of petitioner's right to retired pay notwithstanding the action of the President placing him on the retired list with pay.

3. The Court of Appeals erred in holding and determining that the decision of the Comptroller General was based on statutes of uncertain meaning, and therefore involved "the character of judgment or discretion" by reason of which mandamus or injunction should not issue.

4. The Court of Appeals erred in holding and determining that the status of petitioner as a retired enlisted man of the Army was doubtful under the applicable statutes, and that his right to mandamus was not "clear and indisputable".

5. The Court of Appeals erred in holding and determining by implication that no appropriation was available from which retired pay could be paid to petitioner, and that this

was a question solely for the determination of the Comptroller General.

6. The Court of Appeals erred in reversing the decree of the Supreme Court of the District of Columbia and remanding the cause with instructions to dismiss the bill.

I.

Because the Army and Navy are agents of the Executive, and in recognition of his authority both as Chief Executive and constitutional Commander-in-Chief, the Congress, when enacting into law "rules for the government and regulation of the land and naval forces", has invariably entrusted their accomplishment and execution to the President. In the light of the Constitution, the Congress could hardly have done otherwise; and our entire military history demonstrates that the Congress never has done otherwise; indeed, as this Court, in effect, remarked in *United States ex rel French v. Weeks*, 259 U. S. 326, 333, a case concerned with the retirement and discharge of officers of the Army under section 24b of the National Defense Act, 41 Stat. 759, statutory recognition of the President's jurisdiction seems superfluous, since *ex virtute officii*, he would probably possess jurisdiction over military matters without it. Execution of the military and naval laws is peculiarly the President's function, the head of each military department being his *alter ego* in its operation (*Myers v. United States*, 272 U. S. 52, 133.)

Exclusive jurisdiction over military affairs was vested by act of the First Congress (Act of Aug. 7, 1789, 1 Stat. 49, reenacted as sec. 216, Revised Statutes, now USC 5: 190) in that branch of the Executive named the War Department, which created the Secretary of War the head thereof to perform and execute such duties as might "be enjoined on or entrusted to him by *the President of the United States, agreeably to the Constitution* * * * relative to * * * the military forces, * * * or other

matters respecting military affairs", and to "conduct the business of the Department in such manner *as the President shall direct.*" (Italics supplied.) The Navy, originally included in this Act, was made into a separate department under similar provisions, nine years later (Act of April 30, 1798). The entire structure of the *Law Military* is thus built upon and around the President, and the decisions of this Court from the beginning have emphasized that fact. See Samuel 283, quoted Winthrop, Mil. Law & Prec., 882.

The written Law Military comprises those statutes which deal with the composition, organization, discipline, and efficiency of the Army. Chief among these is the National Defense Act (41 Stat. 787). This act comprises, in great part, the basic code of military law, including general and specific provisions relating to the composition and organization of the Army; and the Articles of War, which deal with its government and discipline. The National Defense Act was constructed by the Congress upon the foundations of an already existing military system, of which the laws relating to the retirement of enlisted men form an important part in their relation to the morale and efficiency of the rank and file of the Army.

The Act of February 14, 1885, 23 Stat. 365, was the first law providing for retirement of enlisted men. The Act of March 2, 1907, 34 Stat. 1217, upon which the petitioner's retirement is based, is a reenactment, with amendments which do not affect this case, of the original law. Both acts are identical in their provision that when an enlisted man shall have served thirty years in the Army, he shall, upon making application *to the President*, be placed upon the retired list with pay and allowances. The reasons which impelled the Congress to the original enactment of 1885 are set forth in the report to the Congress of the Military Committee of the House. That report, printed at page 1368 of the Congressional Record, 48th Congress, 2nd Session, states, *inter alia*:

"Something is needed to give greater stability and a better standing to the enlisted man in our military service. If he could feel that he would have a proper provision for his old age he would be more likely to support the monotonous life of the service contentedly.

"Were such a provision made it would go far to make our military service an attractive one for respectable men, and in this way to get rid of the disreputable characters, who take the first opportunity to desert.

"It is scarcely necessary to say that desertion is not only a great loss to the Government in men, money, and material, but it is the source of serious demoralization.

"The annual desertions from our Army are between three and four thousand, and any measure that would lessen this number might well be considered an economical one; but beyond the question of economy stands that of justice. For it is no more than just that the soldier who has given all the best years of his life to the military service of the country should have some provision made for his old age beside the present Soldiers' Home, where he is separated from his family.

"It is the opinion of the Lieutenant General of the Army that thirty years would be the proper period of service to authorize the retirement of a private soldier or a non-commissioned officer."

The purpose of the Act was thus *to promote the efficiency of the Army* by raising the quality of its active enlisted personnel and improving its morale, these ends to be accomplished by rewarding long and faithful service. The motive was identical with that of the Act of October 1, 1890, of which this Court said, in *Reaves v. Ainsworth*, 219 U. S. 296, 305-6:

"Its purpose is to secure efficiency in those who are to be active in service * * *. * * * this was the motive of the act * * * and *naturally its accomplishment was entrusted to the President.*"

The powers of the Secretary of War are of two kinds—those with which he is invested by statute in his own capacity, and those which he exercises by authority of the President. The first class forms the lesser part of his powers; the second, representing the constitutional powers of the President in the administration of military affairs, are both more comprehensive and more important. The Secretary's order retiring the petitioner was of the latter class; that fixing the rates of his retired pay, of the former. It is with the effect of these orders that this brief is, in the main, concerned.

This Court has uniformly held the Secretary of War to be "the regular constitutional organ of the President for the administration of the military establishment of the nation" (*United States v. Eliason*, 16 Pet. 302), through whom the President speaks and acts in matters appertaining thereto (*Wilcox v. Jackson*, 13 Pet. 513; *United States v. Fletcher*, 148 U. S. 84), and that the Secretary's acts done within his legal competency are the acts of the President (*Wolsey v. Chapman*, 101 U. S. 769; *Runkle v. United States*, 122 U. S. 557; *In re Neagle*, 135 U. S. 63). It is not open to question, therefore, that the order by the Secretary of War retiring the petitioner with pay was, in the eyes of the law, *the act of the President.*

Briefly this is the legal situation: Section 1 of the Army Reorganization Act of February 2, 1901, 31 Stat. 748 (of which section 36, quoted *supra*, p. 3, provided for the creation of the organization since known as the Philippine Scouts), defined "the *Army of the United States*" to consist of "fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry, * * * and *such other* officers and enlisted men as may hereinafter be provided for". The Army of the United States thus described "embraced only what is now known as the Regular Army" (3 Comp. Gen. 135): *it was the Regular Army.* Section 2 of the National Defense Act of June 3, 1916 (*supra*, p. 8)

39 Stat. 166, specifically names the Philippine Scouts as part of the Regular Army, grouping them with the enlisted men of the Quartermaster Corps, the Medical Department, the Signal Corps, and the unassigned recruits, all of whom were then and now are component parts of the Regular Army. Section 2 of the amended National Defense Act of June 4, 1920, 41 Stat. 758 (*supra*, p. 8) likewise names the Philippine Scouts as a part of the Regular Army, providing that "the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts". The enlisted men of the organization have been held subject to military law and triable by courts-martial *as soldiers of the regular army* ever since 1901. The Courts have held them part of the Regular Army. *Atkinson v. Stewart*, 23 Phil. Rep. 405. The Bureau of Pensions has recognized their pensionable status as enlisted men of the Regular Army since 1903, and the Comptroller General himself has held them so, repeatedly. 3 Comp. Gen. 132, 135, 4 Comp. Gen. 82, 83, and A-6560, January 31, 1925. Never until his "advance" decision in this case, in which he virtually repudiates his former decisions, had the slightest doubt been cast upon the status of these enlisted men as part of the Regular Army. The War Department, following the ruling of Secretary Root in 1903 (see footnote p. 38), has uniformly regarded them as part of the Regular Army.

The Congress, pursuant to its power to raise and support armies, by section 36 of the Reorganization Act of February 2, 1901, 31 Stat. 757 (quoted *supra*, p. 3) specifically empowered *the President* "to enlist natives of those (the Philippine) islands for service in the Army." *"The Army"* here means the *Army of the United States;* in this context it could mean nothing else. As already shown, the *Army of the United States* was the *Regular Army.* Acting under the authority of that statute, the President did enlist such natives for service in the Army. This he did in the only way he could have done it, by enlist-

ing them in the Regular Army (see Footnote), being without authority under the statute to enlist such natives in anything else. When enlisted, therefore, it inevitably follows that petitioner became an enlisted man *of* the Regular Army, and that his service under such enlistments was service *in* the Regular Army. It is not possible to come to any conclusion than this, having regard for either the applicable statutes or the enlistment contracts executed by the petitioner.

Having served thirty years in the Regular Army, this enlisted man made application *to the President,* as permitted by the statute, for retirement with pay, and thereupon the President acting through the Secretary of War, placed him upon the retired list with pay, as provided by the statute, by War Department order. His active service

FOOT-NOTE.

In the trial court, photostatic copies of the petitioner's enlistment contracts were submitted to the Court by counsel representing the Secretary of War, duplicates thereof being at the same time presented to counsel representing the Comptroller General. In the brief filed for the Secretary of War in the Court of Appeals the first of these enlistment contracts, dated October 1, 1901, was set out *in extenso.* Eleven in number, they show continuous service for more than thirty years from and after that date. All are identical in form and substance, and recite that "I * * * do hereby acknowledge to have voluntarily enlisted * * * as a SOLDIER in the Army of the United States of America", for the periods named therein. Each contains the usual agreement as to acceptance of bounty, pay, rations and clothing as established by law, and each concludes with the oath:

> "And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the UNITED STATES OF AMERICA, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War."

These enlistment contracts are superscribed "Regular Army of the United States", and are in the same and identical form as to terms and contents as every other enlistment made in the Regular Army during the period 1901-1931.

This statement is made necessary in view of the first paragraph of the "*Statement*" found at page 5 of the Comptroller General's brief in opposition to the writ, which erroneously avers that the enlistments of the petitioner were in the Philippine Scouts and not in the United States Army, a distinction which, it is said, is material.

There is and can be no such distinction. *No person has ever enlisted in the Philippine Scouts as such.* Every enlisted man who has served or is now serving in that organization was enlisted in the Regular Army of the United States and thereafter assigned to the Philippine Scouts.

in the Army thus began as the result of an exercise by the President acting through the Secretary of War, of his power as Commander-in-Chief to enlist natives of the Philippine Islands in the Army in execution of the statute by which the Congress authorized such enlistments; and was brought to a close by another exercise by the President of his power as Commander-in-Chief to retire with pay, enlisted men who apply to him therefor after thirty years service in the Army, in execution of the statute by which the Congress authorized such retirements. From beginning to end, his active service has been performed under the orders and jurisdiction of the President; a jurisdiction vested in him by virtue of his constitutional power as Commander-in-Chief to control the personnel of the Army and his constitutional obligation as Chief Executive to see to it that the laws relating to the Army be executed according to their terms.

The military system operates in its entirety under the supervision of the President as Chief Executive and Commander-in-Chief, represented in its administration by his *alter ego* the Secretary of War. It functions through military (executive) officers and tribunals, who exercise the powers of the President by delegation (Winthrop, Military Laws & Precedents, 882, Reprint 572).

Enlistments are accomplished by recruiting officers; organizations are trained and commanded by officers of the line; promotions, demotions and discharges of enlisted men, by still others higher in the hierarchy of command. The commissions of officers are signed by the Secretary of War; inefficient officers and enlisted men are eliminated from the Service by boards of officers, convened under the authority of statute law and Presidential regulation, sometimes, with, sometimes without the intervention of the President or the Secretary of War. Military conduct is inquired into by executive bodies known as courts of inquiry; military offenses are tried and punished by other executive bodies known as courts-martial. Officers phy-

sically unfit for duty are retired by the Secretary after inquiry by executive bodies known as retiring boards; officers and enlisted men entitled to retirement for length of service are retired upon their own application to the President, by orders of the Secretary of War. All these things are done under the supervision and by the authority of the President in the exercise of the constitutional power of the Chief Executive to administer and execute the laws governing the affairs of the Army as its Commander-in-Chief, through the agency of his *alter ego*, the Secretary of War.

The finality and conclusiveness as against the world of acts and determinations of the heads of the War and Navy departments; of military and naval tribunals, boards and officers, done within the scope of their several jurisdictions, have upon every occasion been pronounced by this Court. This rule applies with equal force throughout the operations of the entire military system, since every act and determination, done within the jurisdiction of either department constitutes an exercise of the Presidential authority derived from identical constitutional sources—the President's duty, and his accompanying power, to see that the laws are faithfully executed, and his powers as Commander-in-Chief of the Army and Navy.

Thus, the finality of the sentences of military and naval courts-martial, when acting within their jurisdiction, has invariably been sustained by this Court. Courts-martial form no part of the judicial system, but are purely executive tribunals of limited and special jurisdiction (*Kurtz v. Moffit*, 115 U. S. 487, 500, *Runkle v. United States*, 122 U. S. 543, 555) convened by order of the Commander-in-Chief or subordinate military or naval officers to whom the power has been delegated, under the authority of "rules for the government and regulation of the land and naval forces" enacted by the Congress and known respectively as the Articles of War, and the Articles for the government of the Navy; and the civil courts pertaining to

the judicial system are without authority to review their proceedings farther than to make sure that courts-martial have kept within their jurisdiction. That being established, the acts of courts-martial are final, conclusive and binding against the world. "If it were otherwise", said this Court in *Dynes v. Hoover,* 20 How. 65, "the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or civil courts".

The rule of finality thus announced in *Dynes v. Hoover, supra,* has been repeatedly affirmed by this Court. *Ex parte Reed,* 100 U. S. 13; *Wales v. Whitney,* 114 U. S. 564; *Smith v. Whitney,* 116 U. S. 167; *Kurtz v. Moffit,* 115 U. S. 487; *Coleman v. Tennessee,* 97 U. S. 514; *Ex parte Vallandigham,* 1 Wall. 243; *Ex parte Milligan,* 4 Wall. 123; *Swaim v. United States,* 155 U. S. 553; *Carter v. McClaughry,* 183 U. S. 365, 380, 381; *Mullan v. United States,* 212 U. S. 516, 520; *Calvers v. McDonald,* 258 U. S. 416.

The decisions of this Court therefore place it beyond cavil that as to courts-martial, which form but one of the numerous parts of the constitutional military system, these executive tribunals are empowered to adjudicate finally whatever they are empowered to adjudicate at all.

This Court, however, has by no means confined to the decisions of courts-martial, its application of the rule of finality. It has applied it as well to the decisions of such other parts of the military system, founded upon the same constitutional powers, as have come before it.

The proceedings of boards charged with the duty of eliminating or discharging officers from the Army; the decisions of retiring boards; of individuals delegated to perform specific duties, or vested with general authority to decide military questions, have all been held final and conclusive when done within the limits of their jurisdiction;

and so also, the acts and decisions of the heads of the War and Navy departments.

By the Act of October 1, 1890, the President was authorized to eliminate from the active list of the Army by retirement or discharge, officers disqualified, in his judgment, to remain in active service. The operation of this act was delegated by the President to boards of officers, subject to his approval. The action of such boards within their jurisdiction was held by this Court to be final and conclusive when approved by the President, in *Reaves v. Ainsworth*, 219 U. S. 296, 304, 306, the Court saying:

> "The decision * * * of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. *Johnson v. Sayre*, 158 U. S. 109. See also *Mullan v. United States*, 212 U. S. 516. * * * If it be disputable whether these provisions guarantee to an officer 'the safeguards of a trial in court', it is certain that the decision is not final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. *This is the only relief from the errors or the injustice that may be done by the board which is provided.* The Courts have no power to review. The Courts are not the only instrumentalities of the government. They cannot command or regulate the Army."

By section 24b of the National Defense Act of June 4, 1920, 41 Stat. 759, the retirement, discharge and elimination of officers from the Army was authorized, by means of Classification Boards composed of officers, subject to optional supervision of the President. Construing this provision of law in *French ex rel. v. Weeks*, 259 U. S. 326, 327, 332, this Court said:

> "The Army Reorganization Act is intended to provide for a reduction of the Army of the United States to a peace basis while maintaining a standard of high efficiency. To contribute to this purpose, Congress made elaborate provisions in the Act for retaining in

the Service officers who have proved their capacity and fitness for command and for retiring or discharging those who, for any reason, were found to be unfit. Every step of this process is committed to military tribunals, made up of officers, who by experience and training should be the best qualified men in the country for such a duty, but with their action all subject, as we shall see, to the Supervisory Control of the President of the United States." (p. 327 * * *.)

"Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. *Johnson v. Sayre*, 158 U. S. 109, 118; *Carter v. McClaughry*, 183 U. S. 365, 380, 381; *Mullan v. United States*, 212 U. S. 516, 520; *Collins v. McDonald*, 258 U. S. 416."

And in the case of *United States v. Jones*, 18 How. 92, 95, this Court announced the principle from which it has never departed when passing upon the effect of decisions of the President made through the head of the competent executive department upon matters committed to that department. The Court said:

"The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments*". (Italics supplied)

This language was specifically reaffirmed in *United States v. Johnston,* 124 U. S. 236.

The Court of Claims, in *Billings v. United States,* 23 Ct. Cls. 166, 178, followed the rule of the Jones case, saying:

> "It is not for accounting officers to inquire into the reasons, nor to take exception to * * * the orders of the President or a department head when issued within the general scope of their authority," and that balances stated by the Comptroller are "not * * * conclusive upon the head of a department in the exercise of his discretion. * * *"

Both the Jones and Billings cases arose out of the creation, by the head of the competent department, of a *military status* which by operation of law entitled the officer concerned to the payment of certain allowances from public funds. In both cases the accounting officers had disallowed the payments, presuming, as in this case, to go behind the orders of the department head, made within his jurisdiction. In both cases the act of the department head, creating *status,* was held conclusive.

The substance of the decisions of this Court upon the subject may well be summarized in the language of the Supreme Judicial Court of Massachusetts which, speaking through Mr. Justice Gray, later a member of this Court, said in the case of *Tyler v. Pomeroy,* 8 Allen 484:

> "Although cases of this kind have fortunately never been common, the general principles which must guide the inquiry are well settled and may be briefly stated. With acts affecting military rank or status only, or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere. Barwis v. Keppel, 2 Wils. 314. *In re Mansergh,* 1 Best & Smith 406, 407, 408: *Johnstone v. Sutton,* 1 T. R. 546, 548, 549; S. C. nom. *Sutton v. Johnstone,* Ib. 784; S. C. 1 Bro. P. C. (2nd ed.) 100. *United States v. Mackenzie,* 1 N. Y. Leg. Obs. 371. 1 Kent. Com. (6th ed.) 341, note. No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised,

set aside or punished, civilly or criminally, by a court of common law. *Leonard v. Shields*, 1 McArthur on Court Martial (30 ed.), 159, *note* 296; 2 Ib. 263, 264. *Grant v. Gould*, 2 H. Bl. 69. *Bailey v. Warden*, A. M. & S. 400. *Wolton v. Gavin*, 16 Q. B. 48. *Luther v. Borden*, 7 How. 45, 46. *Wilkes v. Dinsman*, 7 How. 89; S. C. *nom Dinsman v. Wilkes*, 12 How. 403, 404. Dynes v. Hoover, 20 How. 82.

The jurisdictional integrity and independence of the military system, thus recognized by this and other Courts is but an application to the acts and decisions of the President, done through the head of the competent executive department, of the long established rule repeatedly announced by this Court that:

> "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person, denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the acts done by the tribunal or officer; whether executive (1 Cranch 170-1), legislative (4 Wheat. 423; 2 Pet. 412; 4 Ib. 563), judicial (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167-8), or special (20 Johns. 739-40; 2 Dow P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." *United States v. Arredondo*, 6 Pet. 691, 729, 730; *Belcher et al. v. Linn*, 24 How. 508, 522; *Bernards Township v. Morrison*, 133 U. S. 523, 528. *United States v. California & Oregon Land Co.*, 148 U. S. 31, 43.

To decide the petitioner's eligibility to retirement clearly involved the exercise of judgment and discretion. It was

a question of mixed law and fact as to which the President must construe and apply the law which authorized the petitioner's enlistment "for service in the Army" in 1901; the laws which defined the composition of the Army both then and thereafter, and the relation of the retirement laws to both. He must, in the light of these laws, determine his length of service, by applying the facts contained in the archives of the War Department, as shown by the petitioner's enlistment contracts and the records of his service, with due regard to the many incidents that, under Army regulations having the force of law, may have affected the periods properly to be credited toward retirement. For such length of service is affected by absences, by illnesses or injuries not in line of duty; by court-martial sentences, and numerous other causes. It cannot be determined by a mere inspection of the calendar.

Such a decision as this was peculiarly within the province and jurisdiction of the War Department. Not only did the statutes make it so, but the nature of the question made it so, for the War Department is both the administrator of the military laws, and the keeper and custodian of the military records. It alone possessed the requisite knowledge of the military establishment. It was a decision necessitating an exercise of the jurisdiction of the competent department, since it is obvious that if the Secretary of War, the *alter ego* of the President, was not empowered to make it, then nobody had that power, and the object of the statute had failed. (See 34 Atty. Gen. (Stone) 250. *A parallel case*); and since there was no provision of law for its review by any other officer or tribunal, when made it was *res judicata* (28 Atty. Gen. (Wickersham) 181).

Retirement in the Army, it must not be forgotten, is not a separation from the service, but a mere change in a continuing military status. When officers and enlisted men of the Army are placed upon the retired list, their military lives are not terminated thereby. Quite the contrary is the fact, for by specific provision of the laws (Section 2, Na-

tional Defense Act of June 4, 1920, 41 Stat. 758 (p. 759) "the officers and *enlisted men* of the retired list" are named as components of the Regular Army. As such, they remain subject to military law, to trial by court-martial, and to recall by the Commander-in-Chief to active duty with the colors. During the World War hundreds of retired officers were so recalled, and *nearly every retired enlisted man who remained physically fit* was ordered to active duty. Some seven hundred-approximating 20 per cent of the then total number of retired enlisted men, performed important and responsible war duty: training recruits at the cantonments, superintending work at the supply depots, releasing younger men for service with the Army in France. The retired enlisted man remains in every sense a soldier of the United States.

II.

The poistion taken by the War Department in this matter has been at all times consistent. The Secretary of War having moved to correct the situation resulting from the Comptroller General's advance decision by departmental reference to the Court of Claims—the only method provided by the laws to a department head—requested that court, upon institution of this action by the plaintiff, to hold his reference *in statu quo* and with the approval of the Attorney General, sent his representatives to appear as *amici curiae* before the Supreme Court of the District of Columbia sitting as a court of equity, to present the War Department's view that the Constitution and the statutes having committed to the jurisdiction of the President, and without provision for review, the matter of retirement with pay of enlisted men of the Army, the Comptroller General, in going behind and refusing effect to the order of the President retiring with pay an enlisted man of that part of the Army known as the Philippine Scouts, had exceeded his lawful jurisdiction, and invaded that of the President.

In urging this view in the courts below, neither the Secretary of War nor this petitioner has questioned that in this and other recent cases involving the same principle, the Comptroller General acted in accord with his understanding of the scope of his jurisdiction and duty. Petitioner, however, as did the Secretary of War in the courts below, *does* question the correctness of the Comptroller General's views as to his jurisdiction, and challenges his position that the laws impose upon him the duty or vest him with the power to re-examine and re-determine questions of law and fact already examined and determined by the President in a matter committed by the Constitution and the statutes to the latter's jurisdiction, to wit, the retirement with pay of enlisted men of the Army.

The issue is not new. It has existed in governmental administration, in greater or less degree, for many years. So long ago as 1901, a great lawyer, Elihu Root, then Secretary of War, because accounting officers of the Treasury *occasionally* declined to accept as final, decisions of the Secretary of War in matters committed to his jurisdiction, formally ordered that the War Department "will not hereafter furnish copies of records or statements from them to enable officers * * * of other Executive Departments to review decisions made by the War Department upon purely military questions or to make independent decisions with regard to such questions" which it was "the duty of the War Department to determine in the course of or as incident to the execution of the law". *W. D. Circular, November 2, 1901.*

Judge Advocate General Lieber, whose authoritative writings on military law have many times been cited by this Court, presenting the matter to Secretary Root remarked that: "The question especially presented is as to the power of * * * accounting officers * * * to transfer the jurisdiction of deciding military questions from the competent department to themselves. They have assumed this power, and it is not easy to see why, if they may do it in

any cases, they may not do it in all". For the Court's convenience pertinent extracts from General Lieber's memorandum to Secretary Root are printed in the Appendix at pp. 44-49. The memorandum is out of print and difficult of access.

The identical question is presented by this case. Since 1901, however, and especially since enactment of the Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23, the attitude of the accounting officers, as foreseen by General Lieber, has developed from *occasional* refusal to accord effect to the rulings of the War Department in military matters, to the *habitual* overriding of decisions made within his legal competency by the Secretary of War. The head of the General Accounting Office, the Comptroller General, asserting that under the provisions of section 304 of the Budget and Accounting Act he is constituted a legislative agent, subordinate only to Congress (74 Cong. Rec. 6083, 6084; Ann. Rep. Comp. Gen. 1926, p. 2; Ibid, 1927, pp. V, VI); that he may independently decide any question, regardless of its prior decision by another officer vested with jurisdiction to decide it (6 Comp. Gen. 604; 11 Ibid. 191; 5 Ibid. 301, 688; 4 Ibid. 773; 3 Ibid. 497, 545; 2 Ibid. 784; 1 Ibid. 536; 3 Ibid. 771); that he is not bound by the opinions of the Attorney General (4 Comp. Gen. 773; 5 Ibid. 688; 3 Ibid. 497; 2 Ibid. 784), nor even by the decisions of the Courts (3 Comp. Gen. 316; Ibid. 479; Ibid. 545), exercises such asserted jurisdiction by going behind and re-determining in whatever manner seems to him correct, the very questions already decided by department heads on subjects especially committed to them by statute, with the result that the operation of the executive departments has been reduced to uncertainty and doubt, and their administration made dependent, not upon the direction of their lawful heads, but in large measure upon the approval of the Comptroller General. It is thus an existing condition, not a theory; a condition which carries threat to the national defense in time of peace, and portends disaster in time of war.

The many differences which have arisen between the Executive Departments and the Comptroller General, and the resulting confusion, has been discussed by Prof. W. F. Willoughby in "The legal status and functions of the General Accounting Office of the National Government", in which work the author recognizes the constitutional difficulties which arise from the Comptroller General's broad assertions of jurisdiction to revise executive determinations, and that while such differences have always existed between the accounting officers and the Executive Departments, "this question * * * has become more acute since the creation in 1921 of the independent General Accounting Office." Mr. Willoughby's statement of the matter is printed in Appendix, p. 49.

III.

The Court of Appeals, we submit, misapprehended quite the issue in this case as made by the pleadings. The action was not directed to review by the courts of the Comptroller General's decision, but sought injunction against him on the ground that in going behind and refusing effect to the President's act, he had exceeded his jurisdiction. The intervention of the Secretary of War by his representatives as *amici curiae* was directed to assertion of the paramount jurisdiction of the President, as Chief Executive and Commander-in-Chief. The Court of Appeals failed to give to the jurisdictional situation the consideration its importance to orderly government required, and apparently assumed the Comptroller General's jurisdiction as granted. In this the Court of Appeals was mistaken and was led thereby to judicial error.

The case of *Board of Commissioners v. Aspinwall*, 24 How. 376, is cited by the Court of Appeals as illustrative of the rule that only when a petitioner's right is clear and indisputable will mandamus or injunction issue, and hence, if inquiry into the merits is requisite to determine the right, neither writ will lie. In that case, this Court held Aspin-

wall's right clear and indisputable and affirmed the grant of the writ. The Court of Appeals, however, failed to look sufficiently far to discover the basis of the decision. That basis is found in the decision of this Court in an earlier case between the same parties, viz; *Board of Commissioners v. Aspinwall,* 21 How. 539, in which this Court, in an action by Aspinwall to collect upon certain bonds of Knox County, Indiana, held the decision of the Board of Commissioners of that county that an election authorizing issuance of said bonds was regular, to be final and conclusive and not subject to attack by way of defense against the bonds. Whether the election had been properly conducted, said this Court (p. 544) was a question which "belonged to the board". The later action by Aspinwall (cited by the Court of Appeals) was for mandamus to compel the levy of a tax to satisfy a judgment recovered in his first action. Aspinwall's rights having been determined in that action, and the county being without funds upon which his judgment could be executed, this Court naturally held, in the later action, that his right to the writ was clear and indisputable.

The principles applied by this Court in the two Aspinwall cases are equally applicable to this case. Here the petitioner's right arises from and rests upon the act of the President, who, acting through the Secretary of War, and within his constitutional and statutory jurisdiction, decided plaintiff to be eligible to retirement with pay, and placed him upon the retired list by War Department order, precisely as Aspinwall's right arose from the decision of the Board of Commissioners, within its jurisdiction, that the election was regular, and its issuance of the bonds authorized thereby. As in Aspinwall's case the regularity of the election was a question that "belonged to the Board, so in this case, the petitioner's eligibility to retirement was a question that "belonged" to the President: and the finality of both decisions was determinable by precisely the same rules of law.

In Aspinwall's second case, mandamus to enforce his right was asked against the body empowered to grant it; in this case injunction is prayed against a subordinate who refuses credit to the President's decision, to prevent interference with petitioner's right and to compel the performance of a ministerial act. Were this a case in which the President had *denied*, instead of granting petitioner's application for retirement with pay, and the action were directed against the President (conceiving such an action possible) to compel such retirement; then, if his right was not clear and indisputable, the writ would not lie.

But no such situation exists. The petitioner's right is clear and indisputable for the same reason that Aspinwall's right was clear and indisputable, both being founded upon the acts and decisions of public officers vested by law with jurisdiction to make them, as to which no review by any other was provided by the law, and neither of which acts and decisions was, or is claimed to be, arbitrary and capricious, or clearly and obviously erroneous. Mere doubts as to the correctness of such decisions, by whomsoever entertained, furnished no ground to refuse them credit. *United States v. Finnell*, 185 U. S. 236, 244; *Bates and Guild v. Payne*, 194 U. S. 106, 108, 109, quoted *post*, p. 41.

Since the President had undoubted power and exclusive jurisdiction to retire petitioner, it must follow that he had power to *retire him with pay*, for under the statute, retired pay is a necessary incident to the status of retirement. The existence of the one both implies and establishes the right to the other; the statute links them inseparably together. Therefore it is idle to contend that the Comptroller General's decison does not affect petitioner's retired status, but only his right to retired pay. When petitioner was retired, his right to retired pay attached by operation of law. *Glavey v. United States*, 182 U. S. 595; *Whiting v. United States*, 35 Ct. Cls. 291, 301. "Pay follows status".

The Court of Appeals therefore erred in holding that when applied to, the Comptroller General was required by law to render his decision as to petitioner's right to retired pay; for that was equivalent to holding that the Comptroller General was required to render his decision upon the President's power to retire him. The matter of *retirement with pay* was not within the scope of the Comptroller General's jurisdiction; it "belonged" to the President.

IV.

No theory has been advanced upon which the activities of the Comptroller General in going behind and overriding the acts of the President done within his jurisdiction, are constitutionally admissible unless it be that advanced by himself in the opening sentence of his "Argument" (p. 19, Comptroller General's brief in opposition to the writ)—that accounting is a legislative and not an executive function (See also Foreward to Annual Report of Comptroller General for 1927, p. VI); and that it includes the decision of every question of law or fact that may underlie any disbursement irrespective of prior decision by other officers charged with such duty.

> "The jurisdiction of this office in the settlement of accounts" says the Comptroller General "is to determine any question involved therein; that jurisdiction is specifically recognized in section 8 of the act of July 31, 1894, 28 Stat. 208" (the Dockery Act), "and sections 301 and 304 of the act of June 10, 1921, 42 Stat. 23" (the Budget and Accounting Act). "*The suggestion that certain or some questions are independent of the question of the payment proposed or which will result cannot be looked upon favorably,* as it would lead to determination by others of questions involved in the settlement of accounts independently of this office, to which such determinations are committed * * *. Where a question of * * * pay * * * is involved, *any other question necessary to be determined in ascertaining * * * legal right to * * * pay and the*

> *rate of pay is within the exclusive jurisdiction of this office,* with the right on the part of the claimant if dissatisfied to present the matter in such forum as may be open to him—the Congress or the courts." (Italics supplied (6 Comp. Gen. 604, 606.)

Such a definition of accounting, it may be observed, covers in practical implication the entire field of governmental administration, for the acts and decisions of the heads of executive departments that do not involve directly or indirectly a disbursement of public funds are comparatively few. And it is so applied by the Comptroller General.

That the accounting officers of the government were from 1789 to 1921, part of one of the executive departments, and like other executive officers, and unlike legislative officers, they always have been and still are appointed by the President with the advice and consent of the Senate, seems to us to show the fallacy of the theory of legislative agency. The Constitution (Art. II, sec. 3, clause 4) lays upon the President, not upon Congress, the duty to "take care that the laws be faithfully executed." The very purpose of government accounting and as well the reason for the existence of accounting officers is to make as certain as may be that the laws relating to disbursement of public moneys are faithfully executed. Accounting officers must therefore be the arm, not of Congress, but of the President; for, if the contrary were true, it would be Congress, and not the President, who would "take care that the laws be faithfully executed". It was never intended that Congress should administer the laws which it makes; nor was it ever intended that section 8 of the Dockery Act, which empowers the Comptroller General to make "advance decisions" upon questions of accounting, binding upon the General Accounting Office, should be administered in a manner so foreign to its purpose as to lay prohibitive injunctions upon the President, and thus to preclude him from the performance of this all important constitutional obligation.

"The President," says Mr. Pomeroy (Constitutional Law, sec. 632), "must be left free to 'take care that the laws be faithfully executed'; that is, free to take care that the subordinate officers, who are charged with express, positive duties, in fact perform those duties faithfully. Any attempt to clothe a subordinate official agent, whether of a high or low grade, with express, positive duties which he must fulfill to the letter, or with duties, in the fulfilment of which he has a discretion, and to remove him entirely from the control of the President, to make him entirely independent of the Chief Magistrate,—any such attempt would be directly contrary both to the letter and to the spirit of the Constitution. It would be so far vesting the Executive power in a person other than the President; and it would so far deprive the President of the express power conferred upon him to 'take care that the laws be faithfully executed'. Great as is the legislative function, the people of the United States have never authorized their Congress to construct a new Constitution."

That the foregoing does not accord with the views of the Comptroller General is clear from his utterances upon the subject. A letter addressed by him to the President under date of May 29, 1923 (reported at 2 Comp. Dec. 784), informing the Chief Executive that the General Accounting Office was in nowise bound to heed an opinion of the Attorney General, contains the following extraordinary statement (p. 785):

"* * * it seems proper to suggest the absence of any mention therein of the basic laws which control all branches of the Government in the use of public funds *and places the duty upon this office to see that the laws with respect thereto are duly observed,* * *" (Italics supplied)

This language requires but little comment. The words "duly observed" are equivalent, in this context, to "faithfully executed". Used in a pronouncement addressed to the President in person, upon whom the Constitution lays

the charge to see to it that *all* the laws be faithfully executed, they are peculiarly significant, and capable of but one construction. *The Comptroller General here informs the President of the United States that the duty to see to it that the laws respecting the use of public funds be faithfully executed, devolves not upon the Chief Magistrate, but upon himself as agent of the legislature.*

We sbmit that the position thus asserted by the Comptroller General is at variance with the fundamentals of the Constitution, for as this Court said in the recent case of *Springer v. Philippine Islands*, 277 U. S. 189 (p. 202):

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.
>
> "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."

That decision of the question of petitioner's retirement with pay—a military question pure and simple—was within the exclusive jurisdiction of the President and his *alter ego*, the Secretary of War, and that their determination, within their jurisdiction, of that question, must be accepted by the Comptroller General as the point from which his audit shall begin, follows inevitably from the provisions of the Constitution, the applicable statutes and the decisions of this Court. The principles announced in

United States v. Jones, 18 How. 92, 96, and applied in *Wright v. Ynchausti & Co.*, 272 U. S. 640, cannot be reconciled with any other view.

The expressions of the Attorneys General are all to the same effect, from the opinion of Attorney General Crittenden to the Secretary of War (5 Ops. Atty. Gen. 286), to those of the present administration. Without exception they support the position taken by the petitioner and the Secretary of War in this case. The two latest opinions of that office,—Attorney General Mitchell to the Secretary of Agriculture, March 1, 1933 (37 Ops. Atty. Gen. 95, 100), and Acting Attorney General Biggs to the Secretary of War, August 8, 1933, we invite to the especial attention of the Court. Mr. Mitchell, citing the decision of this Court in *Wright v. Ynchausti & Co.*, 272 U. S. 640,—a case analogous in principle to the case at bar, said:

> "This decision confirmed the view previously taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts *the Comptroller General cannot go behind findings and determinations of the heads of the executive departments in matters specially entrusted to their judgment by statute.*" (Italics supplied)

The full experience of Mr. Mitchell, both as Solicitor General and Attorney General, gave him the intimate acquaintance with the subject that adds weight to his views. The opinion of Acting Attorney General Biggs, as yet unpublished, is printed for convenience of reference, in the Appendix (pp. 52-56).

V.

In his brief filed as *amici curiae* in the Court of Appeals, the Secretary of War said that the principles involved in this case are vital to the War Department and to constitutional government. That statement petitioner adopts and repeats.

We submit that the Budget and Accounting Act of June 10, 1921, *supra*, and particularly section 304 thereof, construed in consonance with the Constitution—for if it can be, it must be so construed (*St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 369), has not made the Comptroller General a legislative agent, independent of the President. The powers and duties of his office as to accounting being precisely those of his predecessor the Comptroller of the Treasury, *wholly executive*, the effect of requiring that the duties of the General Accounting Office be performed without direction from any officer other than the Comptroller General has been to constitute him the head of a separate establishment pertaining to and part of the executive branch of the government, with certain duties not related to accounting, as to which, like other executive officers charged with the duty of making investigations, reports and recommendations, he may be an agent of the Congress. As such head, he is bound to respect the proper powers and jurisdiction of the heads of other executive departments and establishments, even as they are bound to respect his, all under the supervision and paramount authority of the President. We think this must be so, for the Constitution declares (Art. II, Sec. 1, Clause 1) that "The executive power is vested in a President of the United States of America"; it has laid upon him (Art. II, Sec. 3, Clause 4), the obligation "to take care that the laws be faithfully executed," and has named him the Commander in Chief of the Army (Art. II, Sec. 2, Clause 1).

If, however, the Congress has indeed by statute created an officer independent of the President, whose only superior is the Congress, who is empowered to go behind and override the acts and decisions of the Chief Executive and Commander-in-Chief of the Army done through his constitutional representative the head of the War Department, in matters involving functions of command especially committed to his jurisdiction by the constitution and the laws, it has gone far toward nullifying these provisions of the Con-

stitution; it has shorn the President of power to take care that the laws relating to the military forces are faithfully executed, and has reduced to comparative impotence, the Commander-in-Chief of the Army. It has, in short, created an officer who in theory and in practice is the President's superior. We think it clear that there is no place in government under the Constitution for such an officer as this; and that whatever be his status, such powers as the Comptroller General asserts and exercises, and did assert and exercise in this case, are incompatible with the constitutional powers and obligations of the President of the United States.

VI.

The Secretary of War fixed the rates of retired pay and allowances pursuant to the authority vested in him by the act of May 10, 1826, 44 Stat. 496 (*supra*, p. 5), which in all-inclusive terms empowered him to fix "the pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts", with the single limitation that the same "shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army". Compare *McLean v. United States*, 226 U. S. 374.

Retired pay and allowances have been authorized by law for enlisted men of the regular army since 1885, and every appropriation act for the Army since 1887 has carried an appropriation "for the pay of retired enlisted men".

The rates fixed by the Secretary did not exceed, nor were they of any other class than those then and now authorized for enlisted men of the regular army; and having been fixed pursuant to law, they had the force of law, and were binding upon the Comptroller General. *United States v. Freeman*, 3 How. 657.

VII.

Since 1901, the enlisted men of the Philippine Scouts have invariably been paid from the appropriation "Pay,

of the Army", and are now paid therefrom. For the period October 1, 1901, to June 30, 1902, the item applied to their pay was "for the pay of enlisted men" from which they in common with all other enlisted men of the regular army were paid. No question as to the legality of such payment was ever raised by the accounting officers. Since June 1902, the appropriation acts have provided for their pay, and that of other enlisted men of the Army, in separate items, a method devised and frequently used by the Congress to limit the size of particular components of the Army. Their allowances, however, which correspond in nature and kind with those of other soldiers of the regular army, *have always been and are now paid from the general items of the appropriation acts applicable to all enlisted men of the Army.*

VIII.

The matter of the availability and application of an existing appropriation to the discharge of the petitioner's retired pay was a question within the jurisdiction of the Comptroller General; and until overruled by the Courts, his position upon this phase of the case is admittedly binding.

The finality of his position, however, when challenged in the Courts, depends upon and is determinable by the same rules of law that are applicable to the President's act retiring petitioner with pay. Being within the scope of his lawful jurisdiction, the Courts will not disturb it, unless it be arbitrary and capricious, unreasonable, or clearly and obviously wrong. In that event the Courts have power to intervene.

It is the petitioner's contention that the position of the Comptroller General that no existing appropriation is available or applicable to discharge his retired pay is clearly and obviously wrong; that it is arbitrary, capricious and unreasonable.

The appropriation "*for the pay of retired enlisted men*" was part and parcel of the appropriation "Pay of the

Army'' for the fiscal year 1932, as of every other appropriation for that purpose since 1887; and of that appropriation, $402,000. was unencumbered and available when plaintiff was retired.

The Comptroller General asserts that this appropriation, ''for the pay of retired enlisted men'' is not applicable to petitioner's retired pay because it is not in specific terms applied to the pay of retired enlisted men of the Philippine Scouts.

No appropriation has ever been made for retired personnel, whether officers or enlisted men, which in terms is applicable only to a specified branch or organization. Every such appropriation has been made in general terms, obviously intended to apply to *all* retired officers, and to *all* retired enlisted men. And every such appropriation has always been so applied until this case arose.

It is significant that the position of the Comptroller General as to the availability of this appropriation is an afterthought. His ''advance'' decision contains no reference to appropriations or their application: the word ''appropriation'' does not occur in it from first to last. His present position was taken during the pendency of the proceedings in the trial court, after discovering that his claim of power to review the act and decision of the President could probably not be sustained. It is in the nature of an emergency plea, shaped by the exigency in which the logic of events had placed him.

It is the petitioner's position that, being a retired enlisted man, the appropriation ''for the pay of retired enlisted men'' is clearly and obviously available and applicable to pay him, and that the Comptroller General's position to the contrary is equivalent to saying that an appropriation specifically designed and intended to pay retired enlisted men may not be applied to the very purpose for which it was designed and intended by the Congress; therefore, it is arbitrary and capricious, unreasonable and clearly and

obviously erroneous. Being so, the Courts have power to direct its proper application.

Nor is the right of petitioner to receive his retired pay a claim against the United States. The decision of Judge Clayton in *Smith v. Jackson,* 241 Fed. 747, which was adopted by the Circuit Court of Appeals, 5th Circuit, as its own, and was affirmed and commended by this Court in 246 U. S. 388, seems to us conclusive as to this. Judge Clayton said (p. 757):

> "In his answer the respondent says that he sought the advice of the Comptroller of the Treasury under the following provision of the Dockery Act" (Here the court quotes sec. 8 of the Act of July 31, 1894, set out, *ante,* p. 6).
>
> "And he insists that the Comptroller has rendered a decision against Judge Jackson that precludes any action by this Court. * * *
>
> "The relator's salary does not fall under the category of a claim against the United States. It is fixed compensation earned by him and for which a specific appropriation has been made * * *. It requires no argument to show that the case at bar is different from one where a claim is made against the United States, and judgment and discretion is vested in an accounting officer to adjust and settle the claim. *In such a case as that* the Comptroller of the Treasury shall upon application render his decision upon any question involving a payment to be made.
>
> "Here the salary was ascertained or fixed by law and the money for its payment appropriatel by Congress * * *. There was nothing left to the judgment or discretion of the respondent whose duty it was to disburse the money appropriated for the salary. Being satisfied of the identity of Judge Jackson it was the plain duty of the respondent to issue his warrant * * *. The salary of a judge who has served and for whose compensation specific appropriation has been made *is not such a claim that affords any field for the operation of the Dockery Act.*" (Italics supplied).

IX.

As to doubts expressed by the Court of Appeals upon the Comptroller General's suggestion, we submit that these arise, not from the content of the statutes to which the Court adverts (Sec. 26 of the act of June 3, 1916, 39 Stat. 181, Sec. 22a of the act of June 4, 1920, 41 Stat. 776, and the Pay Readjustment Act of June 10, 1922, 42 Stat. 632), but from the Comptroller General's lack of information as to the customs and history of the Army. The key to understanding of these acts is that the organization known as the Philippine Scouts was created in 1901 under section 36 of the act of February 2, 1901, 31 Stat. 757, as a temporary and provisional part of the regular army (see Footnote), officered in the subaltern grades by enlisted men taken from other parts of the Army and temporarily vested with the authority of officers by appointment but without nomination to and confirmation by the Senate, because of which they were not, under then existing laws, eligible to retirement *as officers*. *Wood v. United States*, 107 U. S. 414. The first of these statutes, which limited the right therein conferred to the *retirement in commissioned grade* of these temporary subalterns, to those among them who were American citizens (a considerable proportion of them were unnaturalized Europeans and Canadians), was nothing more than an expression of an established *policy*, concerned with officers alone, based on an ancient custom of the service referred to in old opinions of The Judge Advocate General as "a self-imposed re-

In 1903, Secretary of War Root, replying to an inquiry by the Commissioner of Pensions as to the status of the Philippine Scouts, ruled that the organization "is a component part of the Army of the United States, but not a part of the *permanent* Regular Army." Following this ruling, the War Department has always held the organization to be a temporary and provisional part of the regular army, similar to the Indian Scouts organized (and still existing) under the Act of July 22, 1866, 14 Stat. 333; R. S. 1112; U. S. C. 10:611. Upon this ruling by the Secretary of War, the Pension Bureau has ever since 1903 recognized Philippine Scout veterans as having a pensionable status as members of the regular army, and has paid and is now paying hundreds of such pensions to Philippine Scout veterans or their dependents.

striction on the appointing power", which held none but American citizens eligible to permanent status *as officers.* It is wholly irrelevant to the inquiry.

The proviso attached to the second of these statutes (Sec. 22a, *supra*), that its provisions should in no respect alter the status of the enlisted men, was inserted upon recommendation of the War Department to make sure that the vesting of all "Scout" officers with permanent status (a modification entirely unique of the policy above adverted to), the re-commissioning of some of them in *branches,* and the formation of the entire force into *branches*—the generic term used in military parlance from time immemorial to denote the various arms of the service enumerated in Section 2 of the act as the components of the permanent regular army, should not have the effect of making the Philippine Scout *organization,* as such, a permanent component thereof, but to retain it in the temporary and provisional status in which it was created in 1901, subject to abolition at the will of the President. The proviso has always been so construed by the War Department, and its meaning was never before questioned.

The third statute noticed by the Court, the Pay Readjustment Act of June 10, 1922, in Section 17 provides *inter alia,* promotion on the retired list for "Scout" officers, on the same pay and benefit basis as other officers of like grade and service; and in Section 21, *inter alia,* that the act shall not affect existing law or regulation "governing the pay and allowances of the General of the Armies, the enlisted men of the Philippine Scouts, Marine Band, Naval Academy Band, Indian Scouts or flying cadets; * * *". Other than this, neither officers nor enlisted men of the Philippine Scouts are so much as mentioned in the Act. It also is wholly irrelevant.

It is to be presumed, in the absence of any showing to the contrary, that all statutes in *pari materia* were fully considered, and all questions resolved by the Executive in arriving at the decision that the petitioner, upon service

for over 30 years in this temporary and provisional component of the regular army, was eligible to retirement with pay, the only form of retirement provided by the law for enlisted men. This decision followed long established departmental construction of the statute, acquiesced in by the accounting officers for more than a generation, one outstanding example of which is the uniform retirement with pay, commencing in 1905 with the Seminole *Sandy Fay*, of enlisted men of the non-citizen Indian Scouts created under the act of July 22, 1866, 14 Stat. 333, R. S. 1112, and ever since maintained as a temporary and provisional component of the Regular Army.

All questions being so resolved under authority of a statute (act of February 14, 1885, as re-enacted by the act of March 2, 1907, *supra*) which committed to the President exclusive jurisdiction over the subject matter, the remedy for doubts, if any he entertained, as to the correctness of the President's construction of the law and facts, was not that the Comptroller General review and override his decision; but if he disagreed, to report the supposed error to the Congress with his recommendation for such corrective legislation as that body might deem conducive to the public interest. This is the course of action not only contemplated, but prescribed by section 312 of the Budget and Accounting Act of June 10, 1921, *supra*.

Nor was it a proper exercise of judicial function for the Court of Appeals to sustain his over-riding of the President: its duty, if it considered the President's construction of the law and facts obviously or clearly wrong, was to so decide; but if it found the soundness of that construction merely doubtful, and that is the extreme length to which the court's opinion goes, to leave the clearing of the doubt to the discretion of the legislature. In the case of *United States v. Finnell*, 185 U. S. 236, 244, this court, defining the duty of a court to which is submitted the validity of an established department practice, said (p. 244):

"Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States v. Graham*, 110 U. S. 219, *Wisconsin C. R'd. Co. v. United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards v. Darby*, 12 Wheat. 206, 210; *United States v. Philbrick*, 120 U. S. 52, 59; *United States v. Johnston*, 124 U. S. 236, 253; *United States v. Alabama G. S. R'd. Co.*, 142 U. S. 615, 621. *Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests*". (Italics supplied)

And in the case of *Bates and Guild v. Payne*, 194 U. S. 106, 108, 109, this court, reviewing many of its former decisions upon the subject, said (pp. 108-109):

"* * * where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur v. Paulding*, 14 Pet. 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and as was said by this court in the recent case of *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324: 'Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction'.

"In *Marquez v. Frisbie*, 101 U. S. 475, which was a bill in equity to review the decision of the Land Department in a preemption case, Mr. Justice Miller re-

marked (p. 476): 'This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive.'

* * * * * * *

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

It is for Congress to make the laws which constitute "rules for the government and regulation of the land * * * forces"; it is for the President, as Chief Executive and Commander in Chief to execute them. *Ex parte Milligan*, 4 Wall. 2, 139. The Comptroller General has no function to perform in either sphere. His duty in this case went no further than to ascertain that the President, to whom was committed the responsibility of creating the *status* and making the allowances incident thereto, had performed that duty. *Waters v. United States*, 133 U. S. 208; 215; and that the person to whom the voucher therefor was drawn, was the same person or of the class of persons to whom such allowances had been made. *Smith v. Jackson*, 241 Fed. 747, 757, *et seq.* Such duty involved no exercise of judgment and discretion, but was ministerial only. *Roberts v. United States*, 176 U. S. 221, 231. Having so found, as he was bound to find, since he could not go behind the President's decision, his plain duty was to pass the voucher for payment from the appropriation in specific terms applicable to "the pay of retired enlisted men", included in the Army Appropriation Act for the fiscal year 1932, 47

Stat. 1277, 1280. To do otherwise was arbitrary and unlawful, and the courts had power to interfere by injunction. *Wright v. Ynchausti & Co.*, 272 U. S. 640, 651; 37 Ops. Atty. Gen. 95-100-101; *Smith v. Jackson*, 241 Fed. 747, 757, 775; 246 U. S. 388, 390.

CONCLUSION.

We respectfully submit that the decision of the Court of Appeals of the District of Columbia should be reversed and the cause remanded with direction to affirm the decree of the Supreme Court of the District of Columbia.

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APPENDIX.

Excerpts from an Opinion of Judge Advocate General Lieber, November 1, 1901.

* * * Although none but the Congress, together with the President, can actually legislate for the United States, the field which the President as Executive and Commander in Chief covers with his regulations and orders, having the force of law, is enormous. Even if we limit our view to that part of it which relates to the administration of military affairs, it is still enormous. And the Secretary of War is the official through whom the President exercises this great power. And he is not only the proper official for this purpose, but the only one, except that under him there are subordinate officers who, in their lesser spheres of action and generally subject to his superior jurisdiction, have authority to determine military questions arising in the interior administration of the Army. No official of any other department is vested with the general power of acting for the President in respect to military affairs. From which it would seem to follow that when any such other official of the Government undertakes to act with reference to military affairs or to decide military questions under the jurisdiction of the Secretary of War as the representative of the President, he is acting and deciding without jurisdiction, unless as to some particular matter he shall have had jurisdiction conferred upon him by statute. Where this has not been done he is not "the competent department."

* * * the term "military questions" has been used, * * * as relating to questions of fact, or mixed questions of law and fact, appertaining to the raising of armies and beginning of service; their organization, maintenance, movement, discipline, and control; the transaction of their affairs; the termination of service; and to question of fact in the military history of individual officers and soldiers. The facts are either expressly recorded in the records of which

the Secretary of War and his subordinates are the custodians, or they are deduced from them, or sometimes from other evidence (with the constant aid of a knowledge of the custom or established practice of the military service). These deductions or conclusions are the determination of "military questions", in the sense in which the term has been used.

It will not be disputed that if the Congress, in the exercise of its power "to raise and support armies" and "to make rules for the government and regulation of the land and naval forces," should place the determination of any of these questions under the jurisdiction of officials of other departments than that which, but for such legislation, would be the only "competent department," this action would be constitutional and valid. But when this is not done, where is the authority? Does it follow that because these officials have power by law to settle claims and accounts involving the determination of military questions they are thereby themselves invested with the power of determining such questions?

* * * * * * *

Nor is the principle of the conclusiveness, within its own especial domain, of the jurisdiction of that executive branch of the Government which has control of the administration of military affairs unsustained by the courts. The decisions of the Federal courts, including the highest, are clear and positive in this respect. It is true that they in general relate to the jurisdiction of courts-martial, but it must be remembered that these military courts are no part of the judicial system. Although they have judicial powers, they are a part of the executive machinery of the Government. So that what is held in regard to the conclusiveness of their jurisdiction is by no means foreign to the subject which we are discussing.

In the case of Dynes v. Hoover (20 How., 65), the Supreme Court expressly recognized the independence, within

their own special and limited spheres, of the military and naval systems, or at least of that part of them which relates to court-martial jurisdiction. Citing the provisions of the Constitution giving Congress the power to provide and maintain a navy (this was a case arising in the Navy), and to make rules for the government and regulation of the land and naval forces, and the fifth amendment, which excepts cases arising in the land or naval forces from the requirement of a presentment of a grand jury in cases of capital or otherwise infamous crime, and the clause declaring the President to be Commander in Chief, the Supreme Court (Mr. Justice Wayne delivering the opinion) said that these provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

* * * The exposition of the law, given in Dynes v. Hoover, has been repeatedly affirmed by the Supreme Court. (Ex parte Reed, 100 U. S., 13; Wales v. Whitney, 114 U. S., 564; Smith v. Whitney, 116 U. S., 167; Kurtz v. Moffitt, 115 U. S., 487; Coleman v. Tennessee, 97 U. S., 514; Ex parte Vallandigham, 1 Wall., 243; Ex parte Milligan, 4 Wall., 123; Swain v. United States, 155 U. S., 553.)

* * * * * * *

There can thus be no doubt as to the views of the Supreme Court with reference to the independence and completeness within its sphere of action—that is, within its jurisdiction—of the court-martial system. But this principle is not limited to the court-martial system, which indeed is only a part of a general system founded on the same constitutional powers.

* * * * * * *

The jurisdictional separateness of the military system, thus recognized by the courts, is an application of the same principle that we have been considering, as applied to the conclusiveness of the jurisdiction of the competent department over military questions.

* * * * * * *

The accounting officers of the Treasury and the other officials referred to must undoubtedly construe the statutes which they have to apply in carrying out their statutory powers and duties, and their decisions, under these powers, are in general conclusive; but the fact that officers have been created for the settlement of certain claims and accounts, in the course of which the determination of *military questions* becomes necessary, does not invest them with the jurisdiction themselves to determine these questions, any more than does the power of the civil courts to afford relief in *habeas corpus* proceedings give them the right in such proceedings to review the decisions of courts-martial on *military questions*. The courts have again and again disclaimed the right of extending their jurisdiction to the determination of such questions, and have consistently recognized the conclusiveness of the action of the military authority in its determination of them. Is it not reasonable to say that this jurisdiction which they disclaim should not be assumed by these executive officers—whether or not it be held that in reaching their decisions they are exercising judicial powers?

That officials of other Departments frequently call on the War Department for its determinations in such matters, and in many cases accept and act upon them, indicates that the jurisdiction of this Department is recognized by them, to this extent certainly. But, on the other hand, they often assume the jurisdiction to decide military questions for themselves, in complete disregard of such determinations by the War Department.

* * * * * * *

It is the character of the subject to which the military question relates that makes him (the Secretary of War) the "competent Department" to handle it, * * * and if he is the "competent Department," whence do the officials of other Departments obtain a superior jurisdiction?

Sometimes even the discretionary power of the President is invaded, * * * "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (Martin v. Mott, 12 Wheaton, 31.) But this principle is too well established to need discussion.

It is not, however, the purely discretionary powers that we are here particularly considering. The question especially presented is as to the power of * * * the accounting officers of the Treasury * * * to transfer the jurisdiction of deciding military questions from the competent Department to themselves. They have assumed this power, and it is not easy to see why, if they may do it in any cases, they may not do it in all—determining all military questions for themselves (which is, indeed, what they have at times substantially claimed the right to do). This would lead to remarkable results. * * *

* * * * * * *

* * * there has been no well-defined system in the offices of the * * * accounting officers of the Treasury in the matter of jurisdiction over military questions. Sometimes they recognize the jurisdiction of the War Department; sometimes they assert their own. A question may at one time be left to the decision of the War Department which at another time they will themselves decide, without any regard to the jurisdiction or decisions of that Department. There is no system and no consistency. Perhaps it would be nearest to a correct statement of the condition to say that the different officials who have filled these positions

have or have not accepted the conclusions of the War Department on military questions according as these did or did not agree with their own views. * * * Certainly it can be said that the fact that these questions are military questions is not recognized by them as depriving them of a jurisdiction to decide such questions.

* * * * * * *

G. N. LIEBER,
J. A. Gen'l.

Excerpt from

"The Legal Status and Functions of the General Accounting Office of the National Government."

" * * * the law in broad terms provides that 'all claims and demands of the government of the United States, or against it, and all accounts whatever in which the government of the United States is concerned either as debtor or creditor shall be settled and adjusted in the General Accounting Office'; that the powers and duties vested in the Comptroller General shall 'be exercised without direction from any other officer'; that 'the balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the government'; and that, upon the request of any disbursing officer or head of a department or independent establishment, the Comptroller General 'shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered shall govern the Auditor and the Comptroller of the Treasury [now the Comptroller General] in passing upon the account containing said disbursement.'

Though the general intent of these provisions is clear; namely, that the final settlement of all claims and the passing upon all accounts shall be vested in the Comptroller General, who, in acting shall be guided by his own best judgment, and that his action shall be conclusive upon the executive branch, the application of these provisions in practice gives rise to numerous opportunities for differences of opinion in respect to the scope of the powers of the Comptroller General.

Provisions of permanent statute law impose on the heads of departments and independent establishments the performance of certain duties and vest in them, in many cases, large discretionary power in respect to the framing of rules and regulations having for their purpose to put these laws into effect and in taking action upon specific cases arising under these laws and regulations. With rare exceptions money is required and is voted for the support of the services intrusted with the administration of the law and the performance of the work authorized or directed. The action taken by the heads of the departments and the independent establishments in the framing of these rules and regulations and in acting upon specific cases determines in many instances the circumstances under which claims for payments by the government will arise and the amounts of payments that shall be made. In not a few cases there may be a question whether the heads of the departments or the independent establishments have properly interpreted the statute, whether the rules and regulations issued by them are in conformity with the law or the action taken by them in specific cases is in conformity with the law or the rules and regulations framed for putting such law into effect.

There can be no doubt that in cases such as these it is the duty of the executive officer in the first place to construe the law and determine his powers and duties under it, and if he has doubt in respect to the matter to secure the opinion of the Attorney General. Having done this, the question is then presented as to whether this decision, whether supported or not by an opinion of the Attorney General, is binding upon the Comptroller General in settling accounts arising under the administration of the law, or whether his duty of seeing that no payment of money is made except in strict conformity with law requires that he shall determine for himself whether the action of the executive officer which had as its result to give rise to claims for the payment of money, was correct.

It is manifest that two positions can be taken in respect to this matter. The one is that the determination of the law is the duty of the officer having the administration of the law, assisted, if need be, by the advice of the Attorney General, and that the duty of the Comptroller General is restricted to seeing that no improper payments are made

in administering the law as so construed. The other is that the Comptroller General, in the performance of his duty of protecting the treasury and seeing that no payments not authorized by law are made, must himself construe the law and that if he believes that a payment is not justified by the law as so interpreted by him that it is his duty to prevent such payment being made and if made that reimbursement of the payment is enforced.

Strong arguments can be adduced in support of both of these positions.

In support of the first the claim can be made that it is the intent of Congress, and in conformity with correct principles of public administration, that responsibility for the application of law should reside with the administrative officer charged with its enforcement, that to sanction the right of the Comptroller General to review and reverse administrative action would mean that, in many matters of great importance, that officer and not the head of the department or establishment would exercise supreme administrative authority.

In support of the second, it may be urged that the whole purpose of providing for an independent audit of accounts and the determination by such independent agency of what claims shall be paid, is that of providing for a check upon administrative officers; that the actual payment of a particular claim is of secondary importance to that of determining the validity of the administrative action which gave rise to such claim; that if the Comptroller General is estopped from considering the validity of such action the door is thrown open to an abuse or unwise exercise of administrative authority that will entail illegitimate demands upon the treasury that may amount to many thousands or even millions of dollars.

In general it may be said that administrative officers adhere to the first position and that in such adherence they have had to a large extent the support of the Attorney General, and that the Comptroller General adheres to the second in which he has had up to the present time the general support of Congress. The result is that there is a sharp cleavage within the government in respect to this most important matter, and numerous cases have arisen growing out of this difference of position that have seriously interfered with the due conduct of public affairs.

In further explanation of this difference of position, it should be pointed out that the administrative services, or at least certain of them, take the position that, even if it be admitted that the Comptroller General has the right to question the interpretation placed by them upon the law for the administration of which they are responsible, if the matter in dispute is referred to and passed upon by the Attorney General of the United States it then becomes the duty, if not the legal obligation, of all officers of the government to follow the opinion of the Attorney General as so rendered. The issue in its final form thus becomes one as to whether the opinion of the Attorney General or that of the Comptroller General should govern where the construction of the law as affecting the validity of a class of claims is involved.

This question as to whether the Comptroller General should, as a matter of practice if not of law, be guided by the opinions of the Attorney General in construing the law relating to the operations of the executive departments and establishments is one that has always existed, though as will be shortly shown it has become more acute since the creation in 1921 of the independent General Accounting Office."

[W. F. Willoughby—The legal status and functions of the General Accounting Office of the National Government—1927, page 39]

OFFICE OF THE ATTORNEY GENERAL

(SEAL)

Washington, D. C.

August 8, 1933.

The Honorable

The Secretary of War.

My dear Mr. Secretary:

I have the honor to reply to your letter of May 18, 1933, transmitting the voucher of Captain Biglow B. Barbee, presented to the War Department for payment in the amount of $13.00 on account of per diem allowance for temporary duty in excess of thirty days, which you suggest be considered as an actual case pending in your Department in

connection with your request of March 16, 1933, for my opinion as to whether, in the absence of instructions issued by the Secretary of War, the Comptroller General may, by his authority alone, fix a limit of thirty days as the maximum period within which an army officer may perform temporary duty at one place and receive per diem allowance in lieu of subsistence.

It appears that a question has arisen in the Office of the Chief of Finance as to whether this voucher should be paid by reason of the Comptroller General's letter to the Secretary of the Navy dated August 26, 1932 (A-43746), wherein it was suggested that the proposed travel instructions relating to officers in the Navy be amended so as to limit the performance of temporary duty at one place for which per diem allowance might be paid to a period not exceeding thirty days. This amendment was included in the travel instructions subsequently issued by the Secretary of the Navy.

The War Department has definitely decided not to issue such regulations and the Judge Advocate General has rendered an opinion, which has your approval, holding that in the absence of instructions issued by the Secretary of War, there is no authority in law for the application of such restriction with respect to the travel of officers in the Army. Since you have decided that this is a matter entirely within the jurisdiction of the War Department you are unwilling to submit the above voucher to the Comptroller General as this would acknowledge his right to decide the question. Therefore, before issuing instructions to the Chief of Finance you request my opinion as to your authority in the premises.

Prior to June 30, 1932, officers in the Army on temporary duty were paid on a mileage basis. However, by Section 206-(a) of the Economy Act of June 30, 1932 (47 Stat. 405), such officers were placed on a per diem basis the same as civilian officers of the Government.

Section 206-(a) provides:

"During the fiscal year ending June 30, 1933—all provisions of law which authorize the payment of mileage to officers of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37] are hereby suspended and in lieu thereof such officers shall be entitled to allowances for travel only as provided for civilian employees of the Government, and the Subsistence Expenses Act of 1926, as modified by this Act, and by the Act of February 14, 1931 (Supp. V, U. S. Code, Title 5, sec. 73a), shall apply to such travel * * *"

Section 207 provides:

"Section 3 of the Subsistence Expense Act of 1926, approved June 3, 1926 (44 Stat. 688, 689), is hereby amended to read as follows:

"'SEC. 3. Civilian officers and employees of the departments and establishments, while traveling on official business and away from their designated posts of duty, shall be allowed, in lieu of their actual expenses for subsistence and all fees or tips to porters and stewards, a per diem allowance to be prescribed by the head of the department or establishment concerned, not to exceed the rate of $5 within the limits of continental United States, and not to exceed an average of $6 beyond the limits of continental United States.'"

Section 208 amending Section 7 of the Subsistence Expense Act, provides:

"SEC. 7. The fixing and payment, under section 3, of per diem allowance, or portions thereof, shall be in accordance with regulations which shall be promulgated by the heads of departments and establishments and which shall be standardized as far as practicable and shall not be effective until approved by the President of the United States."

There can be no doubt as to the authority of the Secretary of War to assign officers of the Army to temporary duty as the exigencies of the service may require. This is purely a military question. Nor can there be any doubt as to his authority to issue such regulations as he deems necessary and proper respecting travel of officers in the Army. (See Sec. 161 R. S., and Section 208, amending Section 7 of the Subsistence Expense Act of 1926, *supra.*) It must follow, therefore, that unless Congress has declared an intention by law to limit the period within which officers of the Army may perform temporary duty at one place and receive per diem allowance in lieu of subsistence, the action of the Secretary of War on such matters must be accepted as final by other officers of the Government.

It does not appear from the statutes above quoted that any definite limitation has been prescribed as to temporary duty, nor that any distinction is made therein between civilian officers and officers of the Army. Therefore, since it appears from the Standardized Government Travel Regulations (Par. 48-a; A. R. 35-4060, July 2, 1927, Par. 3d and e) and the Comptroller General's decision of February 28, 1927, published therein as Appendix VII that a civilian officer may be assigned to temporary duty and receive per diem allowance for periods longer than thirty days it necessarily follows that the same rule would apply to officers in the Army.

In view of the foregoing it is my opinion, in the absence of some statutory direction to the contrary, that the matter of making regulations with respect to officers in the Army governing the performance of temporary duty at one place for which per diem allowance may be paid is vested by law exclusively within the jurisdiction of the Secretary of War and the President, and, therefore, the Comptroller General may not go behind your decision not to issue the regulation but must be guided by it in exercising his general authority to audit disbursements and settle accounts. (37 Op. A. G. 95, 100-101; 34 Op. A. G. 162, 170-171.)

As to the amount of money actually due Captain Barbee on this voucher, that must be left to the determination of the Comptroller General subject to the effect of your action in connection therewith, and for that reason I shall not express my opinion on that question.

Respectfully,

(s) J. CRAWFORD BIGGS,
Acting Attorney General.

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF the United States, and Frederick W. Coleman, Chief of Finance, United States Army

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM BY THE SOLICITOR GENERAL

The Solicitor General does not oppose the granting of the writ of certiorari sought in this case because he is of the opinion that the decision of the court below is probably erroneous.

The views of the Solicitor General are shared by other officers of the Department of Justice and of other Departments of the Government; but the Comptroller General believes the contrary position should be maintained. Accordingly, the Solicitor General has authorized the Comptroller General to prepare and file a brief in opposition in this case stating his views.

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Because of this divergence of opinion among officers of the Government, a decision by this Court will be of material advantage in the orderly administration of the Government's business.

The respondent Frederick W. Coleman, Chief of Finance, United States Army, desires to have the statement made that he is in accord with the views of the Solicitor General.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

SEPTEMBER 1933.

U. S. GOVERNMENT PRINTING OFFICE, 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF THE SOLICITOR GENERAL

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 10–12, 33) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 42–48) is reported in 66 F. (2d) 564.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1933. (R. 49.) The petition for a writ of certiorari was filed September 6, 1933,

and was granted October 23, 1933. (R. 53.) The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the Comptroller General may be compelled in a proceeding for a mandatory injunction to refrain from interfering with the payment of retired pay to a member of the Philippine Scouts who has been retired by order of the Secretary of War.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in Appendix A (*infra*, pp. 43–52).

STATEMENT

On April 27, 1932, the petitioner filed a bill in the Supreme Court of the District of Columbia alleging that he enlisted in the Army of the United States on October 1, 1901, and served continuously therein as an enlisted man in the Philippine Scouts until October 31, 1931, on which date, pursuant to his application, he was placed upon the retired list by order of the Secretary of War. (R. 1.) The petitioner then alleged that subsequent to his retirement he submitted to his disbursing officer a voucher for the retired pay and allowances due him for the month of November, 1931; that the disbursing officer transmitted the voucher to the Comptroller General; that the Comptroller General held

that "the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and that by reason of this decision the disbursing officer has declined to make payment to the petitioner. (R. 3–4.) The petition concluded with a prayer that the respondents be restrained and enjoined from preventing the payment to the petitioner of the retired pay and allowances due him for the month of November, 1931, and for subsequent months. (R. 6.)

On May 4, 1932, the respondent Comptroller General filed a motion to dismiss the bill of complaint (R. 7–8), and on May 13, 1932, the respondent Chief of Finance filed a similar motion to dismiss. (R. 9–10.) These motions were based on the grounds, among others, that the petitioner was not entitled to the relief prayed for because the decision of the Comptroller General was final and conclusive, that the proceeding was in reality one against the United States and brought without its consent, and that the petitioner had a plain, adequate and complete remedy at law in the Court of Claims.

On June 10, 1932, these motions to dismiss were overruled. (R. 10–12.) The respondents then filed separate answers, that of the Comptroller General alone objecting to the payment. (R. 12–30, 30–31.) The petitioner moved to strike out these answers on the ground that they did not raise any issue of fact (R. 32–33), and this motion was granted by the court. (R. 33.) The respondents

having elected not to file further answers, the court then entered judgment in accordance with the prayer of the petition. (R. 33–34.)

The respondents then appealed to the Court of Appeals of the District of Columbia, which reversed the judgment of the court below with instructions to dismiss the bill, its opinion being based on the ground that the decision of the Comptroller General was "conclusive so far as the executive branch of the Government is concerned," and that it was not subject to review by mandamus or a similar proceeding. (R. 47.)

SUMMARY OF ARGUMENT

I

In the language of the Comptroller General himself (3 Comp. Gen. 132), "The conclusion is irresistible" that the Philippine Scouts "are a part of the regular Army." Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorized the President "to enlist natives of those Islands for service in the Army, * * *." The petitioner first enlisted under the provisions of this Act, and it is plain that he thereby enlisted "for service in the Army." Not only is this plain from the express terms of the statute under which he enlisted, but it has also been recognized by Congress in the appropriation Acts. The practice under these statutes has also been uniform.

It seems impossible, therefore, to say that there is any substantial basis for contending that the Philippine Scouts are not members of the Army.

If it may fairly be regarded as plain that the petitioner as a Philippine Scout is a member of the Army, then there can be no doubt of the authority of the Secretary of War to retire him.

I

The determination of the War Department as to the petitioner's eligibility to retirement was not subject to reexamination by the Comptroller General. Under the Constitution, the President is the Chief Executive and Commander-in-Chief of the Army. As Chief Executive, it is his duty to see "that the Laws be faithfully executed," and in his capacity as Commander-in-Chief it is peculiarly his function to carry into execution the laws relating to the military establishment. This he does through the agency of the Secretary of War.

The act of the Secretary of War retiring the petitioner with pay was an exercise of the President's jurisdiction in a matter committed to him by the Constitution and by the statutes, and was, we submit, binding and conclusive. The Comptroller General was without power or jurisdiction to review and revise this act or to make independent decision of the same questions of law and of fact that were committed by the Constitution and laws to the decision of the President through his agents, and mere doubts as to the correctness of that decision (if doubts can be said to exist) did not justify refusal upon the Comptroller General's part to accord it credit.

III

The present proceeding is a proper one for determining the questions involved.

The Comptroller General's contention that he is not subject to mandamus or to compulsion in equity because his decision involved an exercise of judgment or discretion does not foreclose an examination of the arguments presented in the first two points of this brief, but depends rather upon the validity of those arguments. If either of those arguments is sound, then the Comptroller General's duty was purely ministerial and his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. His attempted exercise of discretion in a field in which he had no discretion cannot serve to shield him from those remedies.

The contention that this suit must fail because the petitioner has a remedy at law through a suit in the Court of Claims is, we submit, not well taken. That a proceeding such as this may be maintained, although the claimant has a right of action in the Court of Claims, would seem to be established by this Court's decision in *Smith* v. *Jackson*, 246 U.S. 388. A similar result has been reached in many other cases.

ARGUMENT

The major question involved in this case is how far the Comptroller General in an "advance decision" may consider anew and decide questions of

fact and law committed by the Constitution and laws to the jurisdiction of the President or to the head of an Executive Department as his agent, and already decided and acted upon by him. In meeting this issue, we shall contend, first, that the decision of the War Department in this case was correct, second, that under the circumstances here involved the Comptroller General had no authority to reexamine it, and, third, that the present proceeding is a proper one for determining the questions presented.

I

THE PHILIPPINE SCOUTS ARE A PART OF THE REGULAR ARMY

Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorized the President—

> to enlist natives of those islands *for service in the Army,* to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. (Italics ours.)

The petitioner first enlisted under the provisions of this Act, and it is plain that he thereby enlisted "for service in the Army." Not only is this plain from the express terms of the statute under which he enlisted, but it has also been recognized by Congress in the appropriation Acts. The pay of the Philippine Scouts is appropriated under the heading "Pay, and so forth, of the Army." The item of pay for enlisted men of the Philippine Scouts

is segregated from that for "Pay of enlisted men of the line and staff, not including the Philippine Scouts." See, *e.g.*, Act of February 23, 1931, c. 279, 46 Stat. 1277, 1280. But this does not mean that Philippine Scouts are not enlisted men; the language just quoted shows that they are, for Congress there segregated them from other "enlisted men of the line and staff." Such segregation is a means frequently used by Congress to limit the size of particular units of the Army. Appropriations for the "allowances" of Philippine Scouts have never been segregated. They have always been paid from items under "Pay of the Army" applicable to all enlisted men, and are now so paid. Until June 30, 1902, the appropriations for pay were not segregated and the Philippine Scouts and all other enlisted men of the Army were paid from the general appropriation "For pay of enlisted men." Act of March 2, 1901, c. 803, 31 Stat. 895, 896. No question as to the legality of such payment was ever raised by the accounting officers. This contemporaneous construction is obviously entitled to great weight. See also House Doc. No. 254, 57th Congress, 1st Sess., and the provisions of Section 2 of the Act of June 3, 1916, c. 134, 39 Stat. 166 (*infra*, p. 45), and of Section 2 of the Act of June 4, 1920, c. 227, 41 Stat. 759 (*infra*, pp. 45–46).

Moreover, not only are the statutes clear, but the practice under them has been uniform. The War Department as early as 1903 specifically ruled that

the Philippine Scouts were "a component part of the Army of the United States" and this ruling has been uniformly upheld since that time. See pp. 12, 38 of the petitioner's brief. In *Atkinson* v. *Stewart,* 23 Philippines, 405, it was judicially determined that the Philippine Scouts are a part of the regular Army. The Bureau of Pensions has recognized the pensionable status of Philippine Scouts as enlisted men of the regular Army since 1903, and the Comptroller of the Treasury and the Comptroller General himself have held them so repeatedly. 15 Comp. Dec. 304; 25 Comp. Dec. 709; 27 Comp. Dec. 85; 3 Comp. Gen. 132; 4 Comp. Gen. 82; A–6560, January 31, 1925, unreported.[1] In the opinion in 3 Comp. Gen. 132, the Comptroller General reviewed the statutes and the previous decisions with respect to the Philippine Scouts and said that

> *the conclusion is irresistible that they are a part of the Regular Army,* existing by virtue of, and subject to, the limitations of special statutes, and are within the general laws applicable to the Regular Army only when the extension to them of the general laws is not

[1] The status of the Philippine Scouts seems indistinguishable from that of the "Indian Scouts" maintained for sixty-eight years under authority of Section 6 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 333, whose enlisted men as members of a temporary and provisional component of the regular Army have, with the approval of the accounting officers, been accorded the right of retirement with pay at least since 1905.

> inconsistent or in conflict with the special statutes applicable to them, and to include them is clearly within the intent of the general law. (Italics ours.)

It seems impossible, therefore, to say that there is any substantial basis for contending that the Philippine Scouts are not members of the Army. If it may fairly be regarded as plain that the petitioner as a Philippine Scout is a member of the Army, then there can be no doubt of the authority of the President through the Secretary of War to retire him. The Act of March 2, 1907, c. 2515, 34 Stat. 1217, provides:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *.

The pay and allowances to be paid to enlisted men of the Philippine Scouts are governed by Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, as amended by the Act of May 10, 1926, c. 279, 44 Stat. 496,[2] which provides that:

> The pay and allowances of whatever nature and kind to be authorized for the en-

[2] The reports of the committees of Congress with respect to this amending Act make it plain that Congress understood that Philippine Scouts were members of the Army. In these reports enlisted men of the Scouts are referred to together with "enlisted men in the other branches of the Regu-

> listed men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * *

The amount of the allowance, within the limit fixed, is committed ultimately to the Secretary of War, and there is no suggestion that the Secretary has exceeded these limits. The right to the allowance is, we contend, indisputable on the face of the statutes and the long continued practice under them.

None of the authorities relied upon by the Comptroller General in his decision (R. 24–30) and referred to in the opinion of the court below (R. 44–46) casts any doubt, we submit, on this conclusion. Section 26 of the National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 185, by its express terms relates to officers of the Philippine Scouts only. Section 22 of the Act of June 4, 1920, c. 227, 41 Stat. 759, 770, expressly provides that "Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts." A similar express provision appears in Section 21 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 633. The Comptroller General's misconception as to these statutes relat-

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lar Army." Senate Report No. 90, 69th Cong., 1st Sess.; House Report No. 798, 69th Cong., 1st Sess. See also Senate Report No. 195, 68th Cong., 2d Sess., p. 2, relating to an earlier Bill.

ing to officers of the Philippine Scouts is apparently due to his failure to understand that until the enactment of the Act of June 4, 1920, *supra*, the officers of the Philippine Scouts in the lower ranks were usually enlisted men of other branches of the regular Army whose appointments as officers of the Philippine Scouts were only provisional. It was necessary to enact special legislation with respect to their retirement so that they could retire with the allowances of officers instead of being limited to the allowances of enlisted men. In view of the meticulous care in which it was specified in these Acts that they should not affect the status of enlisted men in the Philippine Scouts, it must be apparent that they do not support the Comptroller General's decision. Reference to the conclusion of the Comptroller General's decision seems to show that the decision is based on the Comptroller General's idea of proper public policy in a matter which is solely the concern of Congress and in which Congress has plainly spoken.

So far as this case is concerned with the validity of the petitioner's retirement with pay, the language of this Court in *Alaska Steamship Co.* v. *United States*, No. 56, decided December 4, 1933, seems directly applicable. In that case, this Court held controlling the settled practice of the Department of Commerce, notwithstanding a series of adverse decisions by the Comptroller General, and said:

> The Department of Commerce, not the Comptroller General, is charged with the administration of the statute * * * and its administrative practice should be followed if thought to be controlling. But in any case, there is no ambiguity or uncertainty in the statute with respect to the point urged by the government, and, in carrying it out as written, there is no administrative difficulty which would call for construction. The rulings of the Comptroller General rest upon a proposition so plainly contrary to law and so plainly in conflict with the statute as to leave them without weight as administrative constructions of it.

We submit, therefore, that the right of the petitioner to retirement is clear, and that the decision of the Comptroller General was plainly wrong.

II

THE DETERMINATION OF THE SECRETARY OF WAR AS TO THE PETITIONER'S ELIGIBILITY TO RETIREMENT WAS NOT SUBJECT TO REEXAMINATION BY THE COMPTROLLER GENERAL

Under the Constitution, the President is the Chief Executive and Commander-in-Chief of the Army. As Chief Executive it is his duty to see "that the Laws be faithfully executed," and in his capacity as Commander-in-Chief it is peculiarly his function to carry into execution the laws relating to the military establishment. This he does through the agency of the Secretary of War, who

under the Act of August 7, 1789, c. 7, 1 Stat. 49 (*infra*, pp. 43–44), is made his constitutional and statutory *alter ego* for that purpose.

The petitioner's application for retirement in this case was made under the Act of March 2, 1907, c. 2515, 34 Stat. 1217 (*infra*, p. 49), which provides that the application shall be made "to the President," a Congressional recognition of the President's authority as constitutional Commander-in-Chief to administer the laws relating to the Army. Since the application is specifically required to be made to the President, it is a fair inference that the determination of the questions raised by the application shall be made by the President through his duly constituted agents. In this case that determination was made by order of the Secretary of War, pursuant to which the petitioner was placed upon the retired list (*infra*, p. 52). Congress having made an appropriation specifically designated "for the pay of retired enlisted men" which was both existent and available, the petitioner was clearly entitled to receive his retired pay and allowances therefrom.

The act of the Secretary of War retiring the petitioner with pay was an exercise of the President's jurisdiction in a matter committed to him by the Constitution and by the statutes, done through his constitutional and statutory agent, the Secretary of War, and was, we submit, binding and conclusive. The Comptroller General was without

power or jurisdiction to review and revise this act or to make independent decision of the same questions of law and of fact that were committed by the Constitution and laws to the decision of the President through his agents, and mere doubts as to the correctness of that decision (if doubts can be said to exist) did not justify refusal upon the Comptroller General's part to accord it credit.

The question of the Comptroller General's power and authority, and the effect which must be given to his advance decision turn upon the proper construction of Section 8 of the Act of July 31, 1894, c. 174, 28 Stat. 162, 208. That section provides as follows:

> Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

Prior to the enactment of this statute, the Comptrollers of the Treasury were not legally empowered to make "advance decisions," though they were accustomed to do so upon request. Such "decisions," however, were not binding upon them.

See 20 Ops. Atty. Gen. 654. Up to that time, the principal powers of the Comptrollers relating to the settlement of accounts, so far as they concern the instant case, had been expressed in three statutes, the first of which was the Act of September 2, 1789, c. 12, 1 Stat. 65, establishing the Department of the Treasury. Section 3 of that Act enumerated the duties of the Comptroller, among which were superintendence of the adjustment and preservation of public accounts, the examination of accounts settled by the Auditor and certification of balances arising therein to the Register, and the countersigning of warrants drawn by the Secretary of the Treasury which were warranted by law. Other duties related to forms for collecting revenues, and the manner of keeping and stating the accounts of employees. He was required to provide for the payment of moneys collected, and to direct prosecutions against delinquent revenue officers and debtors of the United States.

The second statute was the Act of March 3, 1817, c. 45, 3 Stat. 366 (reenacted as Section 236 of the Revised Statutes), which provided that:

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Treasury Department.

The third statute was the Act of March 30, 1868, c. 36, 15 Stat. 54 (reenacted as Section 191 of the

Revised Statutes), which was passed to settle a long-standing dispute between the accounting officers and certain department heads who had endeavored to direct changes in balances certified by the Comptrollers, and which the latter held to be final. It provided:

> That the act of March 3, 1817 * * * shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the commissioner of customs or the comptrollers of the treasury, but that such balances, when stated by the auditor and properly certified by the comptroller, * * * shall be taken and considered as final and conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts: *Provided*, That the head of the proper department * * * may submit to such comptroller any facts * * * affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive as hereinbefore provided.

The decisions of this Court in *United States* v. *Jones*, 18 How. 92, 95, *United States* v. *Johnston*, 124 U.S. 236, 252, and in *United States* v. *Waters*, 133 U.S. 208, and that of the Court of Claims in *Billings* v. *United States*, 23 C.Cls. 166, 177–181, appear to have determined definitely that neither under their general powers to settle and adjust claims and demands, nor under their power to state conclusive balances, were the Comptrollers vested

with authority to go behind the decisions of the heads of executive departments upon questions of law and fact relating to subjects confided to their several jurisdictions by the Constitution and laws. In *United States* v. *Jones*, 18 How. 92, 95–96, *supra*, this Court said:

> The secretary of the navy represents the President, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive.

In *United States* v. *Johnston*, 124 U.S. 236, 252, *supra*, this Court said, quoting from *United States* v. *Jones*, *supra*:

> The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.

The Act of July 31, 1894, *supra*, known as the Dockery Act, abolished the First and Second Comptrollers and imposed all their duties upon one Comptroller of the Treasury. This statute was enacted following a report made to Congress by a Joint Committee appointed to revise governmental accounting and auditing. The Committee employed

experts who, *inter alia,* recommended to it (26 Cong. Rec. 4303), that:

> It should be provided that disbursing officers may apply for, and the Comptroller shall render his decision, upon any question involving a payment to be made by them, which decision, when rendered by the Comptroller, shall govern the Auditor and the Comptroller in passing upon the account containing said disbursement.

The Joint Committee adopted this recommendation, and Section 8 of the Act (*supra,* p. 17) was the result.

It thus appears that Congress had in mind legalization of the custom of rendering advance decisions and desired to provide protection to disbursing officers by making it impossible for the Comptroller of the Treasury to disallow payments made by them in reliance upon his decisions. The intended scope of the Act was to permit "pre-audit" of any account which the Comptroller was authorized under already existing laws to settle and adjust, and had no reference to powers and jurisdiction, except as it allowed their exercise before instead of after payments were made. Having regard for the decisions of this Court in the *Jones* and *Waters* cases, *supra,* it cannot be said that the words "any question involving a payment" either included or were intended to include competent decisions already made within their several jurisdictions by the President or by department heads, for

the effect of the *Jones* and *Waters* cases is to make questions resolved by such decisions no longer questions, but adjudications so far as the accounting officers are concerned. Nor can it be supposed that Congress intended by this Act to overturn the whole existing system of governmental administration by creating a super-executive, and in effect to nullify more than a hundred years of statutory enactments by which were vested in the heads of the several executive departments jurisdiction to decide such questions of law and fact as arose in the administration of the laws relating to subjects confided to their departments. If the Congress had any such intention, it would have been expressed in plain and unmistakable terms; nothing would have been left to inference and implication. We contend, therefore, that Section 8 of the Dockery Act related solely to the time of exercise of the Comptroller's powers and not to their scope, and vested him with no broader jurisdiction and no greater powers than he already possessed under the Acts of September 2, 1789, March 3, 1817, and March 30, 1868, *supra,* and that if he might not legally go behind and overrule competent decisions of department heads before the Dockery Act became effective, he had no greater authority to do so afterward.

By Section 301 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 23, the General Accounting Office was established, to be

"independent of the executive departments and under the control and direction of the Comptroller General of the United States"; and by Section 304 of the same Act (*infra,* pp. 49–50) all powers and duties of the Comptroller of the Treasury and the six auditors were "vested in and imposed upon the General Accounting Office," to be "exercised without direction from any other officer" than the Comptroller General. The same section reenacts the substance of the Act of March 30, 1868, *supra,* making "the balances certified by the Comptroller General * * * final and conclusive upon the executive branch of the Government." Section 305 (*infra,* p. 50) reenacts Section 236 of the Revised Statutes (the Act of March 3, 1817), while Section 312 (*infra,* pp. 50–51) imposes upon the Comptroller General, *inter alia,* the duty of making investigations "relating to the receipt; disbursement and application of public funds," and of making reports to Congress relating thereto, with recommendations concerning the legislation he may deem necessary "to facilitate settlement," and to promote economy in expenditures. He is also required to make special reports to Congress of every illegal expenditure or contract made by any department or establishment, and to submit reports concerning the administrative examination of accounts and claims.

There is nothing in the committee reports of Congress with respect to the Budget and Accounting Act of 1921 which indicates in any way that

Congress intended by that Act to endow the Comptroller General with authority to review and redetermine questions already passed on by the executive departments in the performance of their duties to administer the laws. Instead the reports indicate plainly that what Congress desired was "an independent audit." House Report No. 14, 67th Cong., 1st Sess., p. 7. An independent audit connotes the keeping of records and the making of reports, not the determination of questions arising in the administration of the laws. See also House Report No. 96, 67th Cong., 1st Sess. That this was the intention of Congress was further made plain by the report of the Special Committee of the Senate on the National Budget with respect to the bill which President Wilson vetoed (House Doc. No. 805, 66th Cong., 2d Sess.), but which was substantially the same as the Budget and Accounting Act finally enacted in 1921. In this report (Senate Report No. 524, 66th Cong., 2d Sess., p. 7) the committee said:

> Any satisfactory system of Government accounting should have as its underlying principle the investment of final and exclusive authority and responsibility over all accounting and auditing operations in a single official; and this principle should be applied to the furthest extent consistent with the exercise of an undivided control over strictly administrative matters by the heads of departments and establishments.

It is thus plain that Congress had no intention to interfere with the "undivided control over strictly administrative matters by the heads of departments and establishments." It was the purpose of Congress that the Comptroller General should "exercise in general a control over all the accounting procedures of the Government." Senate Report No. 524, 66th Cong., 2d Sess., p. 9. But "the accounting procedures" relate to accounting, and power over accounting is not power to decide how the laws shall be administered. It is rather power to decide how the books shall be kept after the laws have been administered by those to whom that duty has been entrusted by the Constitution and the laws.

The effect of the Budget and Accounting Act, therefore, is to vest in the Comptroller General, as head of the General Accounting Office, the identical powers and jurisdiction possessed by his predecessors, the Comptroller of the Treasury and the various Auditors, over the settlement and adjustment of claims and demands against the United States and the accounting for public funds disbursed by executive officers. While the Act imposes upon him certain other duties not required of his predecessors, as enumerated in Section 312, and makes him independent of the *executive departments* (not, it is well to note, of the *Executive*), there is no provision of the Act which serves to broaden or enlarge his powers and jurisdiction over that pos-

sessed by his predecessors in the matter of the settlement and adjustment of accounts.

In his brief filed in opposition to the writ (p. 19), as well as elsewhere, the Comptroller General has in effect asserted that in the exercise of his power to settle and adjust, he acts as a legislative agent. See the articles cited in Appendix B, *infra*, p. 53. In spite of this contention to the contrary, however, it would seem clear from the form of his appointment and from considerations of the separation of powers, that he is an executive officer. But even if he were solely a legislative officer, such agency would confer upon him no broader jurisdiction or greater power than may be read in the statutes. The assertion of legislative agency would in any event appear ineffective as a basis upon which to predicate a power to go behind and to supervise or overrule the acts of the Executive branch of the Government done within the lawful scope of its jurisdiction. It is the duty of the Congress to make the laws, not to carry them into execution. Cf. 37 Ops. Atty. Gen. 56.

The chief and the most important duty of the General Accounting Office and of the Comptroller General as its head is accounting. All other duties imposed by the Budget and Accounting Act are incidental to this; and accounting, which is only a step in the process of seeing that the laws relating to expenditure of public funds are faithfully executed, would seem clearly to constitute a purely executive function. *Springer* v. *Philippine Islands*,

277 U.S. 189, 202. If this be not so, it is the Congress upon whom rests the duty to see to it, through its agents, that the laws be faithfully executed. But the Constitution places that obligation upon the President. We contend, therefore, that under existing laws, the Comptroller General is not empowered to go behind and to override competent decisions of the President and the heads of executive departments upon subjects confided by the laws to their several jurisdictions; and that, so long as they act within such jurisdiction, and their decisions are neither arbitrary and capricious, nor obviously wrong (*cf.* 34 Ops. Atty. Gen. 250), and no provision for their review is made by the laws, those decisions are conclusive upon the Comptroller General, and he must accept them as the basis for his audits. *Wright* v. *Ynchausti & Co.*, 272 U.S. 640; *Posados* v. *Manila*, 274 U.S. 410.

The view just expressed, moreover, accords with that expressed in many opinions of the Attorneys General throughout the years. 5 Ops. Atty. Gen. 284; 26 Ops. Atty. Gen. 81; 28 Ops. Atty. Gen. 180; 34 Ops. Atty. Gen. 162; *id.* 250; *id.* 311; 37 Ops. Atty. Gen. 95. See also 25 Ops. Atty. Gen. 301, 303–304. In 37 Ops. Atty. Gen. 95, it appeared that the Attorney General had examined certain abstracts of title and expressed his opinion as to the ownership of lands conveyed to the United States, and that the Comptroller General, before approving disbursements made on account of the

purchase price, had demanded that the abstracts be submitted to him. The Attorney General said, in part:

> It is clear that if the purpose of the Comptroller General were to review the work done by me * * * in examination of the title to determine ownership * * *, he would be doing over again the work done in this Department and assuming to form his own judgment on matters which the acts of Congress have left to the decision of the Attorney General. There are a number of statutes * * * which place upon the Attorney General the * * * duty of examining titles and giving an opinion as to ownership of land in connection with purchases and condemnations by the United States. It is clear that in auditing disbursements it is not the duty of the Comptroller General to go behind the opinions of the Attorney General and form his own conclusions as to the state of the title. In making his audit he should start with the opinions of the Attorney General as a basis and accept the conclusions which the Attorney General has reached * * * (p. 98).
>
> * * * * *
>
> At one time the Comptroller General's office was inclined to the view that the general language of the Budget and Accounting Act superseded these various special statutes and authorized the Comptroller General to go behind the findings of the other executive officers of the Government and form his own

conclusions on matters they had determined; but that question has been repeatedly passed on in opinions of the Attorneys General and in decisions of the courts and has been set at rest. * * *

The question was finally disposed of by the Supreme Court of the United States in *Wright* v. *Ynchausti & Co.*, 272 U.S. 640. It appears from that decision that Wright, the Insular Auditor of the Philippine Islands, was performing * * * substantially the same functions as are performed by the Comptroller General in the United States and was operating under an act * * * which, in the respects here material, was substantially like the Budget and Accounting Act under which the Comptroller General operates, and authorized the Insular Auditor to examine and settle all accounts * * *, and it provided that the decisions of the Auditor should be final and conclusive upon the executive branches of the Philippine Government just as does the Budget and Accounting Act of the United States. (p. 99–100.)

* * * * *

The official report of that case shows that Counsel from the office of the Comptroller General of the United States appeared there in an effort to sustain the position of the Insular Auditor, the contention of the Insular Auditor being the same as had previously been made in the office of the Comptroller General of the United States. This decision confirmed the view previously

> taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts the Comptroller General cannot go behind findings and decisions of the heads of the executive departments in matters specially entrusted to their judgment by statute.
>
> As the duty of examining titles * * * is vested by law in the Attorney General, his opinions by law bind all executive departments, and in auditing disbursements * * * the Comptroller General may not go behind these opinions but is bound by them * * *. (pp. 100–101.)

Just as the examination and determination of titles is peculiarly the function of the Attorney General, the determination of who is and who is not an enlisted man in the Army is, we submit, peculiarly a military function and peculiarly for determination by the President through the War Department. This is especially true in this case in view of the express provision of the statute that the application for retirement shall be made "to the President." That determination having been made, the language of the Attorney General in 34 Ops. Atty. Gen. 162, 171, is, we submit, applicable:

> The sole duty of the Comptroller General in regard to such action is to be governed by it in adjusting the amount of pay to which the enlisted man is entitled.

When, as in this case, a designated subject matter has been definitely committed by the Constitution

and laws to the President or a department head, his conclusions as to the law and facts, in a specific case pertaining to that subject matter, "do not require the approval of any officer of another department to make them valid and conclusive." *United States* v. *Jones,* 18 How. 92, 96. That the accounting officers disagree with those conclusions; that they might, or even would have reached a different result, does not empower them to revise the decision of him to whom the law has confided it. Accounting officers are not vested with jurisdiction to sit in review on the acts of the President or his subordinates done within the scope of their lawful jurisdiction. A statute which undertook to give them such power would be of very doubtful validity. *Springer* v. *Philippine Islands,* 277 U.S. 189; *Myers* v. *United States,* 272 U.S. 52; 37 Ops. Atty. Gen. 56.

Nor can the position of the Comptroller General be sustained that at least since the Act of March 30, 1868, it has been the undisputed and uninterrupted practice of the Comptroller (from which practice he deduces the right and power) to decide every question of law and fact considered by him necessary to be decided in determining whether payment from an appropriation is authorized.

Though it be admitted that such a practice has been maintained by the Comptrollers when possible, and that the Comptroller General has asserted power to consider and decide anew questions of law and fact committed by the laws to the jurisdiction of other officers and already decided by

them (6 Comp. Gen. 604, 606), to ignore the opinions of the Attorney General (2 Comp. Gen. 784; 3 Comp. Gen. 497; 4 Comp. Gen. 773; 5 Comp. Gen. 688), and even to decide anew questions already decided by the courts (3 Comp. Gen. 316; *id.* 479; *id.* 545),[3] it is also true that such broad claims upon his part have been productive of much litigation and discord, and that the Attorneys General have denied the existence of such powers (see pp. 25–28, *supra*). In such a situation, it is difficult to consider such a practice as either undisputed or uninterrupted, or as furnishing a valid basis for inference that the law is as the Comptroller General contends. As pointed out in the petitioner's brief (pp. 22–24), as long ago as 1901 Secretary of War Root entered a formal War Department order directly opposing the claims of the Comptroller to decide military questions.

The available materials would seem to show that neither the accounting officers nor the executive departments can rely on an unbroken practice concerning their respective powers and functions. As in the case of the Presidents and Congress, both parties have often asserted their powers, and in the course of time the one and then the other has been in the ascendency in the exercise of power. The issue has been a continuous one, often acute and never settled. But the claim of power is not suffi-

[3] In several of the books and articles cited in Appendix B (*infra*, p. 53), similar broad claims are made on behalf of the Comptroller General.

cient to constitute a grant of power. We contend that no power has been granted to the Comptroller General to revise the determinations of the executive departments in the performance of their duties, and that such a grant if made would be an unconstitutional interference with the President's duty "to see that the Laws be faithfully executed." *Myers* v. *United States,* 272 U.S. 52.

III

THE PRESENT PROCEEDING IS A PROPER ONE FOR DETERMINING THE QUESTIONS INVOLVED

The Comptroller General contends that regardless of the merits of the questions presented above in this brief, the present action must fail for two reasons, among others, first, because his decision involved an exercise of judgment and discretion, and that it consequently may not be coerced in mandamus or in equity (*Decatur* v. *Paulding,* 14 Peters 497), and second, because the petitioner has a remedy at law through a suit in the Court of Claims for his retired pay. We submit that neither of these positions is well taken.

The Comptroller General's contention that he is not subject to mandamus or to compulsion in equity because his decision involved an exercise of judgment or discretion does not foreclose an examination of the arguments presented in the first two Points of this brief, we submit, but depends rather upon the validity of those arguments. An officer required to make a decision is not immune

from mandamus if his decision when made is arbitrary or plainly wrong. *Roberts* v. *United States,* 176 U.S. 221, 231; *Work* v. *McAlester-Edwards Co.,* 262 U.S. 200, 208. If, as we contend in Point I above, the decision of the Comptroller General in this case was plainly wrong, his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. But even if that decision cannot be said to be plainly wrong, applicability of the rule of *Decatur* v. *Paulding,* 14 Peters 497, *supra,* presupposes jurisdiction and authority to make the decision to which it is to be applied. Therefore, if we are correct in our contention in Point II above that the Comptroller General was without authority to review the determination of the War Department on a subject committed by the Constitution and the laws to the President and his subordinates, the duty of the Comptroller General in this case is clear and merely ministerial, and his exercise of discretion in a field in which he had no discretion does not serve to shield him from mandamus or a court of equity. *Wright* v. *Ynchausti & Co.,* 272 U.S. 640; *Posados* v. *Manila,* 274 U.S. 410. In *Wright* v. *Ynchausti & Co., supra,* this Court said (p. 651) with respect to the duty of an auditing officer in such a situation that—

> his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal,

and is applicable to an existing appropriation; and, having been satisfied as to these preliminaries, his duty is merely ministerial.

The Comptroller General's first contention, therefore, is not well taken if either of the arguments already presented in this brief are sound.

The Comptroller General's second contention is that this suit may not be maintained because the petitioner has an adequate and complete remedy at law through a suit in the Court of Claims. Reference to *Pocono Pines Assembly Hotels Co.* v. *United States,* 69 C.Cls. 91, 73 C.Cls. 447, third opinion November 14, 1932, not yet reported, and *Dalton* v. *United States,* 71 C.Cls. 421, in the latter of which the judgment has not yet been paid,[4] shows that it is not entirely clear that the remedy in the Court of Claims is plain and adequate. But whether it is or not, the decisions of this Court show, we submit, that the right to maintain such a

[4] On January 4, 1932, the Chairman of the Committee on Appropriations of the House of Representatives stated on the floor of the House, with respect to that case (75 Cong. Rec. 1233):

"Now, the committee thought it was not fair to the Treasury and to the taxpayers, especially in view of the representation he had made to the committee, for him to go to the Court of Claims; after his services were concluded, and ask for the payment of his retired pay, and I hope that this Congress and all future Congresses will decline to pay the judgment he has obtained, and for that reason we have eliminated it."

See also House Report No. 15, 72d Cong., 1st Sess., and 75 Cong. Rec. 1306–07, Jan. 5, 1932.

suit does not constitute a bar to the maintenance of the present action.

That a proceeding such as this may be maintained, although the claimant has a right of action in the Court of Claims, would seem to be established by this Court's decision in *Smith* v. *Jackson*, 246 U.S. 388. The questions there decided both with respect to the powers of the Comptroller General, and the right to maintain the suit despite the existence of a remedy in the Court of Claims, are so similar to that raised by the Comptroller General here that there would seem to be no doubt as to its conclusiveness in the present case. From the record in that case (No. 457, October Term, 1917) and from the opinions of the lower courts (241 Fed. 747) the facts may be summarized as follows:

William H. Jackson was appointed the District Judge for the Canal Zone. H. A. A. Smith, the Auditor of the Panama Canal, refused to pay to him his full salary, but, instead, deducted certain sums which he asserted were due to the United States from the judge on account of the rental of a house occupied by the judge. An additional sum was also withheld because the judge had been absent from the Canal Zone for a longer period than that allowed by law. These sums were withheld by the Auditor, not on his own initiative, but pursuant to express decisions of the Comptroller of the Treasury. The first of these decisions was rendered on June 23, 1914. The Comptroller was asked to reconsider his decision and on December 28, 1914,

he rendered a new opinion adhering to his previous decision. These decisions were rendered by George E. Downey, Comptroller of the Treasury. On September 16, 1915, W. W. Warwick had become Comptroller of the Treasury, and on that date he rendered a decision to the same effect. On March 25, 1916, the same officer rendered another and comprehensive opinion in which he concluded that "payment of salary to the amount of the debt should not be made by the paymaster of the Panama Canal." The full text of these various opinions appears at pages 20–33 of the record in this Court in *Smith* v. *Jackson*, No. 457, October Term, 1917.

In the meantime, however, the Attorney General, in response to a request for his opinion from the Secretary of War, had decided that no portion of the judge's salary could be withheld. (R. 34–35, in No. 457, October Term, 1917.)

The District Judge filed a petition for a writ of mandamus in the District Court for the Canal Zone, naming the Auditor of the Panama Canal as the respondent, seeking to compel him to pay the amounts which had been withheld. The respondent contended that the Court could not issue mandamus because the plaintiff had a remedy through a suit in the Court of Claims. But, the District Court granted the writ of mandamus as prayed for, and this was affirmed by the Circuit Court of Appeals for the Fifth Circuit on the opinion of the District Court (241 Fed. 747). On a writ of error to this

Court, the judgment was affirmed in a summary opinion in which the Court concluded (p. 391) that "the prosecution of the writ of error from this Court constituted a plain abuse by the Auditor of his administrative discretion."

It is as true of a petition for mandamus as of a bill in equity that, as a general rule, relief will not be granted if the petitioner has another plain, adequate and speedy remedy. *Rex* v. *Barker*, 3 Burr. 1265, 1267, per Lord Mansfield; *Marbury* v. *Madison*, 1 Cranch, 137, 169; High, Extraordinary Legal Remedies (2d Ed.) Sec. 15. Since it was held in *Smith* v. *Jackson* that the decision of the Comptroller of the Treasury and the actions of his subordinates in pursuance thereto were subject to review by mandamus, notwithstanding the existence of a right of recovery in the Court of Claims, it must follow that the existence of a right of recovery through suit in the Court of Claims is not a bar to review through a similar proceeding in this case.

It is no answer to say that the question involved in *Smith* v. *Jackson* was one of pay, for that is the question here. It is likewise no answer to say that the right to pay there was clear and the question raised was the legality of a set-off, for if we are right in our argument in either Point I or Point II above the right to pay here is no less clear and there is no question of set-off.

Besides *Smith* v. *Jackson*, reference may be made to another group of decisions, commonly called the dependent mother cases. In each of them there had

been withheld from the plaintiff, an officer of the Army or Navy, a part of his pay because of the prior payment of allowances granted by law to officers having dependent mothers. These prior payments had been disallowed by the Comptroller General on the ground that the mothers in question were not in fact so dependent. In some of these cases the plaintiffs asked mandamus to compel payment of their pay without deduction, in others injunction to prevent the threatened deduction. The defendants were the disbursing officers charged with the duty of paying the several plaintiffs, and in some, the Comptroller General himself also. In this class of cases, as in the present case, defense was made that plaintiff had a remedy by suit in the Court of Claims (which cannot be denied), and therefore had no other remedy. In *Mare* v. *Alexander,* 2 F. (2d) 895, the District Court for Massachusetts disposed of this argument, saying (p. 897):

> The government further contends that the relator in this case has mistaken his remedy, as he should have sued in the Court of Claims. The answer to this contention is that the Comptroller General has mistaken his remedy. Instead of recovering for the United States the sum deemed to be due by an imperial fiat—let this be done—without hearing the parties in interest he should have instituted a suit in a court of justice. *U.S.* v. *Olmstead,* 118 F. 433. Doubtless it would be convenient if the matter could be settled by the simple process of ordering the

> disbursing officer to withhold the lieutenant's salary—in the language of the street, "docking his pay"—but no such arbitrary power has been invested in the Comptroller General by this new legislation. As Judge Clayton emphatically remarks: "There cannot be such an autocrat. Our government cannot be reduced to a bureaucracy." 241 F. 747, 755, 758.

The decision of the District Court in the above case in favor of the plaintiff was affirmed by the Circuit Court of Appeals for the First Circuit. *Alexander* v. *Mare*, 5 F. (2d) 964.

In *McCarl* v. *Cox*, 56 App.D.C. 27, 8 F. (2d) 669, another case of the same class, the argument was again made that the plaintiff's sole remedy was by suit in the Court of Claims. The court quoted with approval (56 App.D.C. 28, 8 F. (2d) 670), the passage already quoted from *Mare* v. *Alexander*, and concluded (p. 671):

> We therefore rule that, the salary of Commander Cox having been regularly appropriated for, it was the plain ministerial duty of the accounting officers to pay that salary without deductions, and that the decree of the court below was right.

Certiorari was refused by this Court, 270 U.S. 652.

Other cases of the same class are *Dillon* v. *Groos*, 299 Fed. 851 (N.D.Fla.); *Howe* v. *Elliott*, 300 Fed. 243 (S.D.Fla.); *Wylly* v. *McCarl*, 2 F. (2d) 897 (D.Mass.), affirmed, 5 F. (2d) 964 (C.C.A. 1st); *McCarl* v. *Pence*, 57 App.D.C. 159, 18 F. (2d) 809;

Baker v. *McCarl,* 58 App.D.C. 69, 24 F. (2d) 897; *McCarl* v. *Loud,* 59 App.D.C. 238, 38 F. (2d) 943; *McCarl* v. *Emerson,* 59 App.D.C. 239, 38 F. (2d) 944; *McCarl* v. *Orcutt,* 59 App.D.C. 239, 38 F. (2d) 944. In every case of this class the contention might have been made, and in most of them was made, that since the plaintiff had the right of suit in the Court of Claims, he had no remedy by mandamus or bill in equity. In every case cited, the contention was rejected.

The right to pay, and the right to be paid from a designated fund, should not be confused. The Court of Appeals, however, failed to make this distinction when it held that the right to pay "depends upon whether Congress has provided the right * * * and has made an appropriation accordingly. As to that the Comptroller General * * * has the right of determination * * *." (R. 48.)

The right to pay is the inseparable concomitant of retirement and depends in no degree upon any determination by the Comptroller General nor upon the adequacy or even the existence of an appropriation. 20 Comp. Dec. 819, 821; *Graham* v. *United States,* 1 C.Cls., 380; *French* v. *United States,* 16 C.Cls. 419, 422; *Langston* v. *United States,* 21 C.Cls. 10, affirmed, 118 U.S. 389; *United States* v. *Vulte,* 233 U.S. 509. The right to be paid from designated public funds, however, does

depend upon the existence of unexpended funds in an applicable appropriation; that question, and we submit, that question only, was properly for the Comptroller General to determine. But there is an express appropriation "for the pay of retired enlisted men," and the conclusion that that appropriation is inapplicable and unavailable for the pay of a retired enlisted man cannot be arrived at by any reasonable process. The mere statement of the proposition at once stamps it as arbitrary, capricious and obviously erroneous. The accounting officers have no power to modify the provisions of the appropriation Acts, nor to refuse application of appropriations to the purposes designated by their terms.

The plain language of the appropriation here involved itself decided the only question properly submitted to the Comptroller General. Being bound by the terms of the law, "There was nothing left to be determined by his judgment or according to his discretion." *Smith* v. *Jackson*, 241 Fed. 747, 775 (D. Canal Zone), affirmed, 246 U.S. 388. The petitioner's right to receive his pay from this appropriation was clear and the duty of payment became one, which, upon the fact existing, the Comptroller General was bound to perform, and was, therefore, ministerial. *Roberts* v. *United States*, 176 U.S. 221, 231. Being so, not only was it within the power of the court, but it was its duty, to enforce such payment. *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48.

The Court of Appeals seems to have been misled by the plea of the Comptroller General that "at the time the bill of complaint was filed there was a deficiency under 'Pay of the Army' in the amount of approximately $1,900,000, * * *." (R. 21.) The Court of Appeals evidently interpreted the words "there was a deficiency" to mean that the appropriation for the "Pay of the Army" was exhausted when the bill of complaint was filed.[5] The term "deficiency", however, does not mean the actual exhaustion of an appropriation and that no funds are available for disbursement. It means only that a survey of the obligations which *probably* must be met by the end of a fiscal year indicates that the balance on hand at the time of such survey will *probably* be insufficient to meet such estimated obligations. In other words, the term "deficiency" in departmental practice, means the anticipated exhaustion of an appropriation at some time between the date of survey and the end of the fiscal year. No material issue, nor indeed any issue, was thus presented by the allegation of a deficiency.

This was recognized by the Comptroller General himself in the next sentence of his answer which shows the real basis of his position. (R. 21.) The

[5] The respondent Chief of Finance in his answer admitted "that Congress has appropriated funds for payment of the pay and allowances of retired enlisted men of the Army and that such funds are now available for payment and would be paid to plaintiff if vouchers therefor would be passed by defendant McCarl." (R. 31.)

Comptroller General has at no time asserted that the appropriation "for retired pay of enlisted men" was exhausted at the time the petitioner's voucher was presented to him.

CONCLUSION

The arguments advanced above lead to the conclusion that the decision of the Court below is erroneous and should be reversed. The Comptroller General does not agree with this conclusion and accordingly he has been authorized to present his views to the contrary in a separate brief and by oral argument.

Respectfully submitted.

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FEBRUARY, 1934.

APPENDIX A

CONSTITUTIONAL PROVISIONS INVOLVED

1. *The President*

The executive Power shall be vested in a President of the United States of America. (Article II, Section 1, Clause 1.)

The President shall be Commander in Chief of the Army and Navy of the United States, * * *. (Article II, Section 2, Clause 1.)

* * * he shall take Care that the Laws be faithfully executed, * * *. (Article II, Section 3, Clause 1.)

2. *The Congress*

The Congress shall have power * * *

* * * * *

To raise and support Armies, * * *

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces. (Article I, Section 8.)

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *. (Article I, Section 9, Clause 7.)

STATUTES INVOLVED

1. *The War Department*

Act of August 7, 1789, c. 7, 1 Stat. 49:

> That there shall be an executive department to be denominated the Department of

> War, and that there shall be a principal officer therein to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land * * * forces, * * * or warlike stores of the United States, or to such other matters respecting military * * * affairs as the President of the United States shall assign to the said Department * * *; and furthermore, that the said principal officer shall conduct the business of the said department in such a manner as the President of the United States shall from time to time order or instruct.

(Re-enacted in condensed form as Section 216 of the Revised Statutes; U.S. Code, Title 5, Section 190.)

2. *The Composition of the Army*

Section 1, Act of February 2, 1901, c. 192, 31 Stat. 748:

> * * * the Army of the United States, including the existing organizations, shall consist of fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry * * * a Quartermaster's Department, * * * a Medical Department * * * a Signal Corps, * * * the officers and enlisted men of the Army on the retired list, * * * Indian Scouts as now authorized by law, and such other officers and enlisted men as may hereinafter be provided for; * * *.

Section 2, National Defense Act of June 3, 1916, c. 134, 39 Stat. 166:

> COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States, including the existing organizations, shall consist of sixty-four regiments of Infantry, twenty-five regiments of cavalry * * * (enumeration) * * * a Quartermaster Corps, a Medical Department, * * * a Signal Corps, * * *: The officers and enlisted men on the retired list; * * * and unassigned recruits; * * * the Indian Scouts; and such other officers and enlisted men as are now or may be hereafter provided for: * * * *Provided further,* That the total enlisted force of the line of the Regular Army, excluding the Philippine Scouts and the enlisted men of the Quartermaster Corps, of the Medical Department, and of the Signal Corps, and the unassigned recruits, shall not at any one time, * * * exceed one hundred and seventy-five thousand men: *Provided further,* That the unassigned recruits * * * shall at no time * * * exceed by more than seven per centum the total authorized enlisted strength.

Section 2, National Defense Act of June 4, 1920, c. 227, 41 Stat. 759:

> COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; * * * the Quartermaster Corps; * * * the Medical Department; * * *

> the Indian Scouts; the officers and enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency * * *, the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts. (U.S.C., Title 10, Sec. 4.)

3. *The enlisted men of the Philippine Scouts*

Section 36, Act of February 2, 1901, c. 192, 31 Stat. 748, 757:

> That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time, one hundred thousand. * * * The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army. * * * [The omitted passages relate to officers only.]

Section 22, National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 181:

> All existing laws pertaining to or affecting * * * the Philippine Scouts * * * shall continue and remain in force except as herein specifically provided otherwise.

Section 22a, National Defense Act of June 4, 1920, c. 227, 41 Stat. 759, 770:

> PHILIPPINE SCOUTS.—The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient * * * organized similarly to those of the Regular Army * * *. On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified * * * shall be recommissioned in some one of the branches provided for by this Act, and those not so recommissioned shall continue to serve * * * as officers of the Philippine Scouts. * * * Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. * * * Officers of the Philippine Scouts shall hereafter be retired under the same conditions and * * * shall receive the same retired pay, as other officers * * *. Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts. (U.S.C., Title 10, Secs. 321–327.)

Act of May 10, 1926, c. 279, 44 Stat. 496:

> * * * the last sentence of the second paragraph of section 36 of the Act entitled 'An Act to increase the efficiency of the permanent Military Establishment of the United States, approved February 2, 1901,

* * * is hereby amended to read as follows:

> The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * * (U.S.C.App., Title 10, Sec. 334.)

4. *The Chief of Finance*

Section 9a, Act of June 4, 1920, c. 227, 41 Stat. 759, 766:

> The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage of officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War. (U.S.C., Title 10, Sec. 172.)

5. *The Retirement Acts*

Act of February 14, 1885, c. 67, 23 Stat. 305:

> * * * When an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as a private or as a noncommissioned officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank upon which he was retired.

Act of March 2, 1907, c. 2515, 34 Stat. 1217:

> * * * when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *. (U.S.C., Title 34, Sec. 431.)

6. *The Comptroller General and the General Accounting Office*

Section 8, Dockery Act of July 31, 1894, c. 174, 28 Stat. 162, 208:

> Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury [now the Comptroller General] shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (U.S.C., Title 31, Sec. 74.)

Sections 301, 304, 305, 306, and 312, Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 23, 24, 25:

> SEC. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. * * * (U.S.C., Title 31, Sec. 41.)
>
> SEC. 304. All powers and duties now conferred or imposed by law upon the Comp-

troller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921. (U.S.C., Title 31, Sec. 44.)

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (U.S.C., Title 31, Sec. 71.)

SEC. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. * * * (U.S.C., Title 31, Sec. 46.)

SEC. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a re-

port in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

* * * * *

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

* * * * *

(U.S.C., Title 31, Sec. 53.)

C. *War Department Circular and Order involved*

1. Section II, W. D. Circular #41, September 21, 1931.

Retired pay and allowances of Philippine Scouts.—Under the provisions of the Act of February 2, 1901, as amended by the act of May 10, 1926 (44 Stat. 496), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:

1. *Pay.*—Seventy-five percent (75%) of the base pay and the longevity pay received

by them on the active list at the time of their retirement.

2. *Allowances.*

a. Six dollars and thirty five cents ($6.35) per month in lieu of rations and clothing, and

b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat and light. (AG 220.85 (4-3-31)

* * * * *

By order of the Secretary of War:

GEO. VAN HORN MOSELEY,
Major General,
Acting Chief of Staff.

Official:

C. H. BRIDGES,
Major General,
The Adjutant General.

2. Paragraph 35, Special Orders 207, War Department, September 3, 1931:

35. Master Sergeant SANTOS MIGUEL, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600-A, 211-2. (A.G. 220.85.) (4-3-31.)

By order of the Secretary of War:

DOUGLAS MACARTHUR,
General,
Chief of Staff.

Official:

C. H. BRIDGES,
Major General,
The Adjutant General.

APPENDIX B

Books and Articles Relating to the Powers and Functions of the Comptroller General

BOOKS

Hotchkiss, The Judicial Work of the Comptroller of the Treasury (1911).

Langeluttig, The Department of Justice of the United States (1927), c. XIII.

Smith, The General Accounting Office (1927).

Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government (1927).

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Langeluttig, *Legal Status of the Comptroller General of the United States* (1929) 23 Illinois Law Review 556.

McGuire,[6] *The Accounting Officers of the United States and Judicial Precedents* (1925) 19 Illinois Law Review 523.

McGuire,[6] *Legislative or Executive Control over Accounting for Federal Funds* (1926) 20 Illinois Law Review 455.

McGuire,[6] *The Opinions of the Attorney General and the General Accounting Office* (1927) 15 Georgetown Law Journal, 115.

[6] Mr. McGuire is a member of the Comptroller General's legal staff.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, AS COMPTROLLER GENERAL of the United States, and Frederick W. Coleman, as Chief of Finance, United States Army

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT, COMPTROLLER GENERAL OF THE UNITED STATES, IN OPPOSITION

OPINION BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 8–9, 25) and the final decree for injunction entered by that court (R. 25–26) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 32–38) is reported in 61 Wash. L. Rep. 637–639, — Fed. (2d) —.

JURISDICTION

The judgment sought to be reviewed was entered in the Court of Appeals of the District of Columbia on June 26, 1933 (R. 39). The petition for certiorari was filed September 6, 1933. Petitioner invokes the jurisdiction of this court under section 240 (a) (c) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938–939.

QUESTION PRESENTED

I. General Question

Whether injunction lies in the Supreme Court of the District of Columbia to compel payment of a claim against the United States which the Comptroller General of the United States has decided is not authorized to be paid under existing appropriations, in the absence of an appropriation made specifically for payment of that identical claim.

II. Specific Question

Whether injunction lies in the Supreme Court of the District of Columbia to compel the Chief of Finance, United States Army, to cause payment to be made and to compel the Comptroller General of the United States to approve payment of retired pay and allowances to a former enlisted man of the Philippine Scouts after the Comptroller General of the United States, on an application for decision by an Army disbursing officer before whom a voucher covering such claim for retired pay and

allowances was pending for payment, has rendered his decision holding that such payment is not authorized under existing appropriations.

STATUTES INVOLVED

In note 2, case of *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, etc.*, 275 U.S. 1, 4–5, this Court recently has summarized the pertinent statutes and stated the jurisdiction of the respondent, Comptroller General of the United States, thereunder, as follows:

> The accounting branch of the Treasury Department was created by the Act of September 2, 1789, c. 12, §§ 1, 3, 5, 1 Stat. 65, 66. Steps in its growth and in the development of its control over Government expenditures may be traced in the Acts of May 8, 1792, c. 37, § 1, 1 Stat. 279; July 16, 1798, c. 85, § 1, 1 Stat. 610; March 3, 1817, c. 45, §§ 1, 3–5, 3 Stat. 366, 367; May 7, 1822, c. 90, 3 Stat. 688; March 30, 1868, c. 36, 15 Stat. 54; June 8, 1872, c. 335, §§ 21–25, 17 Stat. 283, 287–288. In 1894 there was a general revision of the statutes dealing with the accounting officers. Act of July 31, 1894, c. 174, 28 Stat. 162, 205–211. The powers and duties there outlined were in the main those transferred to the General Accounting Office by the act of 1921. The question of the jurisdiction of the Comptroller General is not a question as to bookkeeping merely. *The decision of the Comptroller General upon the allowance of*

accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act of July 31, 1894, c. 174, § 8, 28 Stat. 162, 207, following the provisions of the earlier Act of March 30, 1868, c. 36, 15 Stat. 54. Save in cases where resort is had to the courts, therefore, the Comptroller is the final arbiter as to the legality of expenditures. * * * See *St. Louis, Brownsville & M. Ry. Co.* v. *United States,* 268 U.S. 169, 173–174. (Italics supplied.)

This Court had occasion to notice these statutes further in connection with other recent cases involving attempts to invoke mandamus or injunction to coerce the respondent, Comptroller General of the United States, to approve payment of claims against the United States in such amounts as the claimants conceived were due them: *United States ex rel L. Margulies & Sons, Inc.* v. *McCarl, etc.,* 56 App. D.C. 147, 10 F. (2d) 1012, certiorari denied 273 U.S. 696; *McCarl, etc., et al.* v. *United States ex rel Leland,* 59 App. D.C. 362, 42 F. (2d) 346, certiorari denied *United States ex rel Leland* v. *McCarl, etc., et al.,* 282 U.S. 839; *Richmond, Fredericksburg & Potomac R. Co.* v. *McCarl, etc.,* 61 App. D.C. 290, 62 F. (2d) 203, certiorari denied 288 U.S. 615. In the leading case of *United States* v. *Lynch* (1890), 137 U.S. 280, involving a petition for mandamus to coerce the Fourth Auditor and the Second Comptroller of the Treasury to approve payment of a claim of a Navy officer against the United

States, the statutes prior to the Dockery Act of 1894 and the Budget and Accounting Act of 1921 were noticed and construed by this Court. The recent case of *Lambert Lumber Co.* v. *Jones Engineering and Construction Co.*, 47 F. (2d) 74, certiorari denied 283 U.S. 842, contains a comprehensive review of the legislative history of the pertinent statutes.

The provisions of the statutes deemed particularly for consideration, together with notes on legislative history thereof, are printed in Appendix A, pp. 29–43, *infra*.

STATEMENT

The petitioner, Santos Miguel, a native Filipino, first enlisted in the *Philippine Scouts* October 1, 1901, and, under original and subsequent enlistments, served continuously in that organization until October 31, 1931. (The statements in the petition (p. 7) that petitioner "first enlisted October 1, 1901, in the United States Army * * *" and that petitioner "reenlisted in the Army" are inaccurate. The enlistment was in the Philippine Scouts. The distinction is material. R. 10–11.)

Paragraph 35, War Department Special Orders, No. 207, dated September 3, 1931, announced respecting the petitioner as follows:

> 35. Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P.I., effective Oc-

tober 31, 1931, and will be sent to his home. The travel directed is necessary in the military service.

By order of the Secretary of War.

DOUGLAS MACARTHUR,

General,
Chief of Staff.

A voucher subscribed by Major Benj. L. Jacobson, Finance Department, U.S. Army, covering the petitioner's claim for retired pay was transmitted by the disbursing officer before whom the voucher was pending for payment, Major S. R. Beard, a bonded Army Finance Officer, Headquarters Philippine Department, to the respondent, Comptroller General of the United States, through the Chief of Finance, on November 5, 1931, with a request for decision as to whether payment on the voucher was authorized, as follows:

Subject: Retired pay.

To: Comptroller General of the United States, (through Chief of Finance, Washington, D.C.).

1. *The accompanying voucher* covering retired pay of Master Sergeant Santos Miguel, R-320883, Service Company, 45th Infantry (PS), *is forwarded with request for an advance decision as to the legal authority for payment.* (Italics supplied.)

2. Reasonable doubt exists as to the authority of the Secretary of War, under the provisions of the act of February 2, 1901, as amended by act of May 10, 1926 (44 Stat.

496), to authorize retirement and fix the retired pay and allowances of enlisted men of the Philippine Scouts, as prescribed in Section II, Circular 41, War Department, dated September 21, 1931, copy herewith.

3. The voucher referred to in paragraph 1 above was referred to the undersigned as disbursing officer, office of the finance officer, Philippine Department, Manila, for payment.

S. R. BEARD,
Major, F. D.,
Disbursing Officer.

This request from Major Beard for decision was forwarded to the Comptroller General from the War Department on December 16, 1931, by 1st Ind., which, in pertinent part, is as follows:

241.18-FAA (Miguel, Santos) #R-320883.

[1st Ind.]

WAR DEPARTMENT, OFFICE CHIEF OF FINANCE,
Washington, December 16, 1931.

To the COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C.

1. This request for advance decision is made under the authority contained in the act of July 31, 1894 (28 Stat. 208; U.S.C. 31:74). It is requested that such decision when rendered be forwarded to the disbursing officer, through this office. (R. 12–13.)

The respondent, Comptroller General of the United States, gave full consideration to the voucher and statements presented in support of the request for his decision, and also carefully considered the statutes and their legislative history governing the pay of the Philippine Scout organization, and considered also the opinions which had been delivered in reference to the status of the Philippine Scouts by and under former Secretaries of War and by the Government accounting officers, and considered the status of the Philippine Islands as an unincorporated territory of the United States and the status of the natives thereof, as well as the various appropriation acts which have made provision for pay and allowances; and he reached the conclusion that payment of *retired* pay and allowances to the petitioner, on the voucher presented, under existing appropriations of the public moneys, was not authorized. He thereupon rendered his decision to Major Beard through the Office of the Chief of Finance, Washington, D.C., as requested (R. 13). The decision, dated January 19, 1932, is published in printed form, 11 Comp. Gen. 275, and a copy thereof is attached to the answer of the Comptroller General as Exhibit A (R. 18–22). The decision is self-explanatory and recites certain of the doubts entertained by the Comptroller General relative to the validity of the petitioner's claim against the United States. The decision on the question presented by Major Beard having to

do with whether payment was authorized under existing appropriations appears in the concluding paragraph, as follows:

> *You are not authorized to pay the voucher,* which will be retained in the files of this office. (Italics supplied.)

The Secretary of War, on February 15, 1932, requested the United States Court of Claims to give its decision on the question of petitioner's right to be paid retired pay under existing appropriations, and the request has been assigned Departmental Reference No. 169 in that Court. (R. 17.) The letter of the Secretary of War filed in the Court of Claims, in pertinent part, is as follows:

> DEAR MR. CHIEF JUSTICE: Pursuant to the provisions of paragraph 148 of the Judicial Code, I hereby refer to the Court of Claims, with request for its decision * * * a claim * * * of Santos Miguel (appellee), a former enlisted man of the Philippine Scouts. * * *
>
> * * * * *
>
> On the 5th day of November 1931, Major Stephen R. Beard, Finance Department, U.S. Army * * * stationed at Manila, Philippine Islands, forwarded to the Comptroller General of the United States, requesting (under authority of sec. 8, act of July 31, 1894, 28 Stat. 208, and sec. 304, act of June 10, 1921, 42 Stat. 24) an advance decision by that official *as to his authority to pay the same,* a voucher in the amount of

> $50.81, evidencing the claim of the said Santos Miguel for his retired pay and allowances for the month of November 1931. *The Comptroller General, on January 19, 1932, rendered his advance decision to Major Beard, denying the latter's authority to pay said voucher,* and deciding that enlisted men of the Philippine Scouts are not entitled to retirement under the laws of the United States.
>
> *The War Department finds itself unable to accept or concur in this advance decision of the Comptroller General.* * * *
>
> I especially request the early consideration and decision of this matter by your honorable court. * * * (Italics supplied.)

The petitioner's bill of complaint for injunction in the present proceeding was filed April 27, 1932 (R. 1). The jurisdictional questions were raised by timely motions of the respective respondents to dismiss the bill of complaint (R. 6–8) and by the answer of the respondent, Comptroller General of the United States (R. 9–22).

In memorandum opinion of June 10, 1932 (R. 8–9), overruling respondent's motions to dismiss the bill, the Supreme Court of the District of Columbia decided the questions of law and fact it conceived as arising on the pleadings (Memo. Op. July 16, 1932—R. 25). That Court found that upon the request of the proper disbursing officer for decision whether he was authorized to make payment to the petitioner of retired pay the re-

spondent, Comptroller General of the United States, had ruled that enlisted men of the Philippine Scouts are not entitled to retired pay and that the disbursing officer was not entitled to make payment to him; also, that the purpose of the bill of complaint was to compel payment of such retired pay by the Chief of Finance, notwithstanding the decision of the Comptroller General of the United States, and to restrain the Comptroller General from interfering with such action; that is, to restrain the Comptroller General of the United States from applying the decision rendered on the disbursing officer's request, in the examination, adjustment and settlement of the account of the disbursing officer making payment, as the bill averred otherwise would be done. (Paragraph 6 of the Bill of Complaint—R. 3.)

On those findings, among others, the Supreme Court of the District of Columbia *held* (R. 9):

> I conclude that the motions to dismiss must be overruled for the following reasons:
>
> 1. *In my judgment* the Philippine Scouts are and since their organization have been a part of the Army of the United States. Enlisted men * * * of the Scouts are entitled to retirement after thirty years' continuous service.
>
> * * * * *
>
> Having found that the law authorized retirement I do not think the court is bound by the decision of the Comptroller General to the contrary.

2. The next question is that of appropriation.

> * * * *counsel for the Comptroller General argued that the appropriation does not exist,* * * *. Again I think this is a question of law upon which the court is not bound by the Comptroller General.* The appropriation is "for the pay of retired enlisted men." Having held that plaintiff is a retired enlisted man, I conclude that he comes within this language.
>
> 3. *It may be that plaintiff has a remedy in the Court of Claims. But having held that he is legally retired and that there is money available to pay him, I think* the duty of payment is a ministerial one, and that this court has authority to compel the performance of that duty. (Italics supplied.)

After this overruling of the motion of the respondent, Comptroller General, to dismiss petitioner's bill the said respondent filed his answer (R. 9–22) to the bill. The petitioner's motion to strike this answer was sustained July 16, 1932, in memorandum opinion of the Supreme Court of the District of Columbia (R. 25). Final decree for injunction thereupon was entered (R. 25–26) September 16, 1932, in pertinent part as follows:

> Adjudged, ordered, and decreed, that (1) the said motions by the respective defendants [respondents here] to dismiss the said bill of complaint be and the same are hereby overruled; and (2) the said motion by the

plaintiff [petitioner here] to strike out the said answers of the respective defendants be and the same hereby is allowed; and, the respective defendants having failed to file other answers or defense to the said bill of complaint within the time required by the rules of the court, but having elected to stand on their respective motions to dismiss and on their answers as filed, and having stipulated that a final decree be taken at this time, it is further

Adjudged, ordered, and decreed, that (1) the defendant, J. Raymond McCarl, Comptroller General of the United States, be restrained and enjoined from and against any and all interference with the defendant, Frederick W. Coleman, Chief of Finance, United States Army, to prevent the payment to plaintiff of the retired pay and allowances due him for the month of November, 1931, and for subsequent months, and that shall accrue to his credit hereafter; and that said defendant be enjoined and commanded to return forthwith to plaintiff's disbursing officer the voucher for his retired pay and allowances for the month of November, 1931, which voucher is now being retained in the files of the office of said defendant, and (2) the defendant, Frederick W. Coleman, Chief of Finance, United States Army, be and he is hereby enjoined and commanded to pay or cause to be paid to plaintiff the retired pay and allowances due him for the month of November, 1931, and subsequent months,

and to continue to pay or cause to be paid to him his retired pay and allowances in the manner in which and at the times when such pay and allowances are ordinarily paid to retired enlisted men of the Army.

The appeal to the District of Columbia Court of Appeals was from this final decree for injunction entered pursuant to the action of the Supreme Court of the District of Columbia sustaining petitioner's motion to strike the answer (R. 26) of the respondent, Comptroller General, the allegations of the bill not admitted in the said answer being taken as denied and the allegations of said answer being taken as admitted by the motion to strike, for purposes of the appeal.

Aside from the matters otherwise established on the record set forth above, the answer of the respondent, Comptroller General, establishes

(1) The procedure set forth in the regulations of the War Department, promulgated for the guidance of disbursing officers and other officials of that department in obtaining decisions from the Comptroller General of the United States on questions involving payments to be made by them or under them, was observed by the disbursing officer and the Chief of Finance in obtaining the decision on the petitioner's claim for payment (R. 14–15).

(2) *It has been the practice (which is undisputed and otherwise abundantly appears from the decided cases) of the Comptroller followed without interruption, at least since the act of March 30, 1868,*

15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether a payment on a claim is authorized to be made under appropriated moneys of the United States, except in those rare cases where the Congress, by specific language, has made the finding or decision of some other official conclusive (R. 15).

(3) The claim of the petitioner covered by the present proceedings for retired pay and allowances had been pending before the United States Court of Claims over two months when the bill of complaint was filed in the court below on April 27, 1932, such claim having been referred on February 15, 1932, by the Secretary of War with the request that the Court of Claims decide the legal rights of the appellee to retirement and to retired pay and allowances, and, independently thereof, the petitioner has a plain, adequate, and complete remedy by a direct suit on his claim for retired pay and allowances in the Court of Claims (R. 17).

(4) The Comptroller General did not coerce or even invite the application of the disbursing officer and the Chief of Finance for an advance decision, nor has he interfered with the performance by them of their official duties (R. 12, 13, 15).

(5) The Chief of Finance does not function as a bonded disbursing officer (R. 16).

(6) The Comptroller General had no knowledge or information sufficient to form a belief (and the record contains no evidence) that the petitioner

applied to the President for retirement and was by direction of the President placed on the retired list (R. 10).

(7) The Congress has never specifically provided any appropriation authorized to be used for payment of retired pay and allowances to enlisted natives of the Philippine Scouts, and the War Department has never brought to the attention of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contemplated or had been accomplished (R. 16).

(8) No appropriated moneys are available to pay the petitioner retired pay and allowances (R. 16, 18).

(9) There has been no unlawful or improper failure, omission, or refusal to pay petitioner retired pay (R. 17).

The answer of the Comptroller General, moreover, categorically and repeatedly denied the allegations of the petitioner's bill of complaint that the petitioner is entitled to retired pay and allowances and the allegations and conclusions thereof that appropriated moneys of the United States are available and authorized to be used for making payment of such retired pay and allowances to the petitioner as well as the allegations and conclusions of the bill that the petitioner has been retired in accordance with existing laws and that he is entitled under the laws to retired pay and allowances as claimed by him (R. 10–18).

The interests of all parties impugning the correctness of the decision of the Court of Appeals of the District of Columbia were carefully and fully presented in both of the lower courts by able counsel. The chief counsel for the petitioner is a former acting Judge Advocate General of the Army. The counsel from the Office of the Judge Advocate General of the Army who appear on the record (R. 23) as counsel for the respondent, Chief of Finance, requested and were permitted to file elaborate briefs and to argue orally in both of the lower courts as *amici curiae* (Memo. Op. R. 8, and R. 31), presenting not only the reported views of the Secretary of War and Chief of Staff but, also, argument on behalf of the merits of the petitioner's claim against the United States, and in support of the contention that the questions presented to this court in the petition (p. 2) are necessarily for decision. Although petitioner's counsel of record filed only a *pro forma* brief of eight printed pages in the Court of Appeals of the District of Columbia the said counsel from the Office of the Judge Advocate General of the Army filed a printed brief, including exhibits, of 237 printed pages and supported the brief in oral argument (R. 31).

Both of the lower courts heard petitioner's counsel and counsel from the War Department (R. 8, 31) fully and patiently, yet neither of the lower courts found on the record the questions for decision which are stated in the petition (p. 2) to be for the decision of this Court.

The Supreme Court of the District of Columbia decided the legal merits of the petitioner's claim as against the United States, on the *ex parte* presentation made, then decided an appropriation was available to pay and directed the respondents to conform their official action to the court's decision (R. 8–9, 25–26).

The Court of Appeals of the District of Columbia in its opinion of June 26, 1933 (R. 32–39), reversing the decree of the Supreme Court of the District of Columbia and directing dismissal of the petitioner's bill for injunction, found the question presented by the record for decision (R. 33) to be substantially as stated herein (p. 2), namely, whether injunction lies to compel the respondent, Comptroller General, to approve and allow credit for payment of a disputed claim for retired pay and allowances against the United States, and sustained in every particular the separate brief thereon, prepared by counsel in the Office of the Comptroller General, under the direction and supervision of the United States Attorney for the District of Columbia, and filed in that court on behalf of the respondent, Comptroller General of the United States.

SUMMARY OF ARGUMENT

Numerous decisions of this Court are accepted to have settled that neither mandamus nor mandatory injunction may be invoked for the purpose of establishing a disputed claim for money, pen-

sion, or compensation against the United States, or of compelling payment thereof out of the public moneys. Those decisions are deemed controlling of the question which the record in the present case presents for decision. The Court of Appeals for the District of Columbia in its decision of June 26, 1933, not only fairly and impartially found the question arising on the record but, in the deciding thereof, correctly and properly gave effect to and applied the controlling decisions of this Court. In such view of the case no reasons are understood to obtain under Rule 38, paragraph 5 (c), of this Court, for granting review on writ of certiorari of the decision of the Court of Appeals for the District of Columbia.

ARGUMENT

The legislative branch of the Government maintains its constitutional control (article 1, section 9, clause 7) over the public moneys through the appropriation acts and the duly constituted accounting officers whose decisions, by the statutes, are made final and conclusive on the executive branch of the Government on questions involving the payment of claims and accounts within their jurisdiction. The legislative and, also, the judicial branch of the Government have been alert to make this control effective and to suppress the attempts which have been made at frequent intervals throughout the history of the Government to frustrate and nullify such control. The legislative history of the ac-

counting statutes set forth in Appendix A (pp. 29–43, *infra*) and the array of decided cases in this Court and the Courts of the District of Columbia involving applications for mandamus or mandatory injunction reflect the ingenious and plausible devices and arguments which have been relied upon by the promoters of such attempts.

The present proceeding for mandatory injunction is typical of such *ex parte* proceedings which have been instituted on claims against the United States with a view to obtaining a payment of money out of the Treasury of the United States without submitting the claims to free inquiry either where the merits are authorized to be examined and decided judicially (United States Court of Claims) or where the availability of an appropriation to pay is authorized to be determined (General Accounting Office) as between the claimant and the United States.

The decisions of this Court, rendered before the legislative branch established any forum wherein disputed claims for salary, compensation, etc., might be prosecuted to final judgment in an original proceeding against the United States, settled that mandamus or mandatory injunction may not properly issue to compel officers of the Government to approve and pay such claims. *United States* v. *Guthrie* (1854), 17 How. 284, 302–305; *Reeside* v. *Walker* (1850), 11 How. 272, 289–292; *Brashear* v. *Mason* (1848), 6 How. 92, 100–102; *Decatur* v. *Paulding* (1840), 14 Pet. 497. The rule of these

cases has not been modified since the passage of the Tucker Act (28 U.S.C. 250) authorizing prosecution of such claims to final judgment in a judicial proceeding directly against the United States. On the contrary this Court has confirmed unequivocally the correctness of the rule. *Hurley et al.* v. *Kincaid* (1932), 285 U.S. 95, 104; *United States* v. *Lynch* (1890), 137 U.S. 280, 283–287.

On May 10, 1932, the then Attorney General addressed a letter to the Secretary of War concerning his understanding as to the nature of the present proceeding in pertinent part as follows:

> There are many suits brought in the District and elsewhere against officers of the United States which involve matters in which the United States alone is really interested. *A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as much a suit against the United States as if the United States were named a party.* The officers named as defendants have no personal interest whatever in the controversy. It is the established practice in such cases for the Attorney General to take charge of the *defense* of such cases, the appearances for the defendant officials being made by the United States Attorneys.
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> Under these circumstances it seems appropriate for me to confirm my oral request that the answer or return interposed for the

> Chief of Finance in the Miguel case by the officials of the Judge Advocate General's Department be withdrawn and that any answer or return required to be filed, be filed by the United States Attorney. *I am informed that the United States Attorney suggests that there are grounds on which this suit ought to be dismissed independent of the merits and that the return interposed for the Chief of Finance by the Judge Advocate General's office would seriously embarrass him in the position he has taken.* * * * (Italics supplied.)

Thereupon the answer referred to was withdrawn and on May 13, 1932, the United States Attorney for the District of Columbia filed a motion (R. 7–8), on behalf of the respondent, Chief of Finance, to dismiss the petitioner's bill of complaint, etc., similar to the motion which the United States Attorney theretofore had filed on May 4, 1932, on behalf of the respondent, Comptroller General of the United States.

The applicable principle which the Attorney General's cited letter of May 10, 1932, suggests is settled by decisions of this Court. Although the United States is not named a party, the action is one against the United States, where the individual respondents have no personal interest in the controversy, when the relief sought is against the named respondents only in their official capacity, and where the United States is "the only real party

against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 123 U.S. 443, 506; *Belknap* v. *Schild,* 161 U.S. 10, 25; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386-387. The United States is an indispensable party if the action is one which may interfere with the performance of governmental functions and vitally affect interests of the United State. *Morrison* v. *Work,* 266 U.S. 481, 485–486; *Lambert Co.* v. *Balto. & Ohio R.R. Co.,* 258 U.S. 377, 383; *Hopkins v. Clemson College,* 221 U.S. 636, 642–643; *Oregon* v. *Hitchcock,* 202 U.S. 60, 68; *Belknap* v. *Schild,* 161 U.S. 10; *New York Guaranty Co.* v. *Steele,* 134 U.S. 230, 232.

A substantial right of the United States "cannot be tried behind its back" (*Louisiana* v. *Garfield,* 211 U.S. 70, 78) and the present proceeding fails under decisions of this Court by reason that the United States is not, and cannot be made, a party. *Louisiana* v. *McAdoo,* 234 U.S. 627, 628–629; *Goldberg* v. *Daniels,* 231 U.S. 218, 221–222.

The present proceeding likewise fails under section 267 of the Judicial Code, Act March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384) which provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Aside from this controlling statute the rule declared is as old as the earliest period in the re-

corded history of English equity jurisprudence, and it is the general practice of courts of equity to dismiss a bill of complaint to recover realty, money, compensation, etc., if it be grounded merely on an alleged title: *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U.S. 568; *Litchfield* v. *Ballou*, 114 U.S. 190, 192; *Hurley et al.* v. *Kincaid*, 285 U.S. 95, 104; *McKee* v. *Rudolph*, 56 App. D.C. 207, 12 F. (2d) 148, certiorari denied, 273 U.S. 710; *Parkersburg* v. *Brown*, 106 U.S. 487, 500.

In the cited case of *Hurley et al.* v. *Kincaid*, decided *February 23, 1932*, 285 U.S. 95, 104, after both the District Court and the Fifth Circuit Court of Appeals seem to have disregarded the controlling force of this elementary rule in equity jurisprudence, and after a voluminous record had been built up, at great expense and effort on behalf of all parties, this Court reannounced this very plainly established rule, that equity could not entertain jurisdiction because there was an ample remedy at law, namely the right to recover compensation under the Tucker Act (24 Stat. 505) and that such remedy was plain, adequate, and complete.

In the more recent case of *Williams* v. *United States*, 289 U.S. 553, involving a claim of one of the judges of the United States Court of Claims for pay or compensation on the basis that he sat as a judge of a "constitutional" court, this Court (p. 560) said:

> Plaintiff is, and since November 11, 1929, has been, a judge of the Court of Claims of

> the United States. Since his entry upon the duties of his office, and until June 30, 1932, he received a salary at the rate of $12,500 per annum, as fixed by the Act of December 13, 1926, c. 6, §1, 44 Stat. 919. Since that date he has been paid at the rate of $10,000 per annum under a ruling of the Comptroller General of the United States. Compare *O'Donoghue* v. *United States,* decided this day, *ante,* p. 516.
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> On February 8, 1933, this suit was brought in the Court of Claims to recover the amount of the difference between the statutory rate of $12,500, and the smaller amount paid under the ruling of the Comptroller General. The suit was brought by plaintiff in the court of which he is a member, *because,* as it is averred, *no other court or remedy was open to him:* * * * (Italics supplied).

The reserving, in the decisions by the respondent, Comptroller General, of the doubtful questions involved, for judicial decision in a direct proceeding against the United States, authorized under the Tucker Act, neither in that case nor in the present case resulted to prejudice any legal status or right of the claimants. *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, 173–174; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Major Collins's Cases,* 14 *id.* 568 and 15 *id.*, 22. Such reservation by the Comptroller General of doubtful questions for judicial determination did operate, however, to properly conserve and protect the interests of the

United States and the authority of the legislative branch over the public moneys. *Mullett* v. *United States,* 21 Ct. Cls. 485, distinguishing *McElrath* v. *United States,* 102 U.S. (12 Otto) 426. Also, to make all interested parties secure from possible future litigation which would have been necessary had payments been made not authorized by law. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *United States* v. *Keehler,* 9 Wall. 83; *Heidt* v. *United States,* 56 F. (2d) 559, certiorari denied 287 U.S. 601; *Fidelity and Deposit Co. of Md.* v. *United States,* 55 F. (2d) 100; *United States* v. *Moore,* 168 F. 36, 24 L.R.A. (NS) 309; *United States* v. *Dempsey,* 104 F. 197.

After the respondent, Comptroller General, had ruled that payment of petitioner's claim was not authorized, all officers of the United States, and the petitioner as well, were chargeable with knowledge that the payment could not be made under existing appropriations and that the claim is not further for consideration in the executive branch of the Government. *Southern Pacific Co.* v. *United States,* 268 U.S. 263, 265; *Anderson's Case,* 59 Ct. Cls. 813, 61 *id.,* 201; 21 Op. Atty. Gen. (McKenna) 530, 531; 22 *id.,* 581; 23 *id.,* 431; *id.,* 586; 24 *id.,* 85; *id.* 553; 25 *id.,* 185; *id.,* 614; 26 *id.,* 431; *id.,* 609; 33 *id.,* 265 *id.,* 268.

The Court of Appeals for the District of Columbia not only has applied the decisions of this Court correctly in its decision of June 26, 1933,

directing dismissal of the petitioner's bill of complaint but throughout its history has correctly applied the decisions of this Court in other similar cases, examples of which are *Hurley, etc.*, v. *Shanley* (1932) App. D.C., 60 F. (2d) 335; *McCarl, etc. et al.*, v. *Rogers*, 60 App. D.C. 111, 48 F. (2d) 1023; *Same* v. *U.S. ex rel. Leland*, 59 App. D.C. 362, 42 F. (2d) 346; *Same* v. *Walters*, 59 App. D.C. 237, 38 F. (2d) 942; *U.S. ex rel. L. Margulies & Sons, Inc.*, v. *McCarl, etc.*, 56 App. D.C. 147, 10 F. (2d) 1012, certiorari denied, 273 U.S. 696; *Lochren* v. *Long*, 6 App. D.C. 486; *Seymour* v. *South Carolina*, 2 App. D.C. 240. An analogous question rarely arises outside the courts of the District of Columbia, but when it has arisen the decisions of this Court generally have been applied correctly. *James Howden & Co.* v. *Standard Shipbuilding Corporation* (C.C.A. 2), 17 F. (2d) 530, 532; *In re Departmental Reference No. 167*, 59 Ct. Cls. 813, 816.

CONCLUSION

The decision of the court below is correct. Not only does there appear to be no conflict of decisions but the principle involved has been settled repeatedly by this Court. We therefore do not believe that the case involves any question of sufficient general importance to merit review by this Court. The petition should be denied.

In view of what the Solicitor General has found it proper to state in the memorandum which he has

filed it is deemed appropriate to make available for the Court's examination in Appendix B, pp. 43–54, copies of the letters of September 14, 1933, and September 21, 1933, from the respondent, Comptroller General, to the Attorney General suggesting the interests of the United States and of the General Accounting Office involved in the case which were believed essential for bringing to this Court's attention.

Copies of the Attorney General's letter of September 16, 1933, and of the Solicitor General's letter of September 21, 1933, specially authorizing the filing of this brief in opposition are annexed, Appendix C, pp. 55–56.

Respectfully submitted.

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General Accounting Office
(*For the respondent, Comptroller General of the United States*).

OCTOBER 1933.

APPENDIXES

APPENDIX A

The act of July 31, 1894, 28 Stat. 206, 207–208, provided:

SEC. 7. Accounts shall be examined by the Auditors as follows:

* * * * *

"Second. The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the Office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of War. (31 U.S.C. 72.)"

* * * * *

SEC. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the

board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account.

* * * * *

All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, *may apply for* and the *Comptroller* of the Treasury *shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller* of the Treasury *in passing upon the account* containing said disbursement. (31 U.S.C. 74.) (Italics supplied.)

These provisions of the Dockery Act of 1894 were amended by the Budget and Accounting Act of June 10, 1921, 42 Stat. 23–26, as follows:

SEC. 301. There is created an establishment of the Government to be known as the General Accounting Office, *which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.* * * * (31 U.S.C. 41.) (Italics supplied.)

* * * * *

SEC. 304. *All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department,* and the duties of the division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, *shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government* * * * (31 U.S.C. 44.) (Italics supplied.)

* * * * *

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U.S.C. 71.)

* * * * *

SEC. 312. * * *

* * * * *

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law. (31 U.S.C. 53c.)

These provisions of the Budget and Accounting Act of 1921, not only continue the provisions of previous accounting acts, making the balances certified by the Comptroller General conclusive in the executive branch of the Government, but establish the General Accounting Office "independent of the executive departments and under the control and direction of the [respondent] Comptroller General" (section 301) and provide that the duties vested in that office of examining and auditing claims and accounts and of deciding "any question involving a payment to be made" under the head of the War Department or any other executive department, etc., or by any disbursing officer thereof, "*shall * * * be exercised without direction from any other officer.*" (Italics supplied.)

The provisions cited from section 8 of the act of July 31, 1894, were substantially reenacted from the act of March 30, 1868, 15 Stat. 54. The legislative history of that act (39 Congressional Globe 218–219, 1117, 1404, 1421, 2073, 2082, and 2234) conforms with the Report of the Committee on Revision of Laws of February 16, 1869, in reference to a recommendation from the Secretary of War that the provisions of the 1868 act vesting such jurisdiction in the accounting officers should be repealed. The Report of the Committee on Revision of Laws

was reprinted in 26 Congressional Record, 4341–4342, in connection with the consideration of the provisions of the Dockery Act cited, to explain the legislative purposes in reenacting such provisions. The Committee Report, in pertinent part, is as follows:

ADJUSTMENT AND SETTLEMENT OF ACCOUNTS AGAINST THE GOVERNMENT

FEBRUARY 16, 1869.—Ordered to be printed and recommitted to the Committee on the Revision of the Laws

Mr. Poland, from the Committee on the Revision of the Laws, made the following report:

The Committee on the Revision of the Laws, to whom was referred a communication from the Secretary of War in relation to payments made by that Department under the provisions of an act passed March 30, 1868, and suggesting that said act be repealed or modified, have had the same under consideration, and report thereon as follows:

By the act of March 3, 1817, the offices of accountants in the War and Navy Departments were abolished, and it was provided that thereafter "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtor or creditors, shall be settled and adjusted in the Treasury Department."

This act provided for the appointment of an additional comptroller and four auditors, making in all two comptrollers and five auditors, and entire and complete jurisdiction over the settlement and adjustments of all the claims and demands above mentioned was vested in these officers.

This system of settling public accounts has been in operation from 1817 to the present time.

The act provided for no appeal to, or revision by, the Secretary of the Treasury, or the head of any Department in which the claim originated, and it is evident from the language used that the final decision by these officers was to be conclusive, except by a resort to Congress or the courts.

The committee are satisfied that it was the intention of the framers of the act of 1817 to establish a tribunal for the settlement and adjustment of accounts against the Government that should be wholly independent of, and in no way subject to, control or revision by those Departments or officers by whom the public expenditures and liabilities are incurred.

The special provisions of many subsequent acts show that such was the understanding of Congress. The leading principle upon which this system of accounting and adjustment was established appears to have been that all accounts involving the expenditure and disbursement of public moneys should be settled and adjusted by officers holding under appointments independent of the heads of Departments, and who, themselves, had nothing to do with the disbursements. In short, they designed to prevent officers who made or directed the expenditure from having any voice or influence in judging of the legality or rightfulness of it, and such check was necessary to insure a judicious and honest expenditure of the public funds.

As a general rule, this interpretation of the act of 1817 has prevailed ever since its passage. We do not find that it has ever been questioned by anybody except the War

Department. There has been an occasional restiveness in that Department at being subjected to the decision of these accounting officers upon accounts arising in the Quartermaster General's Office.

As early as 1823 the question was raised as to the conclusiveness of an adjudication by the accounting officers of the Treasury Department upon an account arising in the Quartermaster's Department, and the question was referred to Mr. Wirt, then Attorney General. The whole subject was fully and exhaustively considered by him in an elaborate opinion, and the conclusion reached that the adjudication of claims by the accounting officers of the Treasury was final and conclusive, and binding upon all the Executive Departments of the Government.

In several subsequent opinions of Mr. Wirt the same views were reiterated.

During the Attorney-Generalship of Mr. Berrien the same question was again started, whether the decision of the accounting officers was binding upon claims originating in the Quartermaster's Department.

Mr. Berrien took a different view of the subject from Mr. Wirt, and held that such adjudications were not conclusive, but that they might be reopened and revised by the Secretary of War. Subsequent Attorneys General have had occasion to give opinions on the same subject.

The late Chief Justice Taney and Mr. Crittenden concurred in the views expressed by Mr. Wirt, while others took the same ground with Mr. Berrien.

The view of Mr. Berrien and those who have agreed with him were based mainly upon the relative rank and position of those accounting officers with the head of a De-

partment, and the seeming incongruity that the head of a Department should be bound by the decision of a subordinate, and especially a subordinate in another Department. It was also urged that, as it was the duty of the head of the Department to issue his warrant or requisition for the money found due, he must, therefore, have the power to examine and satisfy himself that the money is justly due, otherwise he is reduced to a mere machine. This line of argument seems to the committee wholly inconclusive and unsound. Congress may by law devolve such powers and duties as they choose upon public officers of any rank, and when they have done so, without giving either expressly or by implication a power of revision or control to another, their action is as conclusive upon those above as those below them in dignity of position. It is the command of the law, not the command of an inferior officer, which the superior is bound to obey. The decision of the most inferior magistrate, within his jurisdiction, is binding upon the highest officers and tribunals in the land, unless the law gives them power to revise and control his decision.

It appears to the committee that this assumption of power in the head of the War or any other Department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the Department under whose direction the money was paid, or the claim accrued, then

the whole system of checks to improper expenditure, which it was supposed had been established, falls to the ground.

Aside from this consideration, the committee believe that the just rights of the Government itself, as well as the rights of claimants against the Government, are much more likely to be preserved, by being subject to the examination and adjudication of experienced men accustomed to examining accounts and weighing evidence, than they would be if subject to revisal and reversal by the action of subordinates in another Department, selected with no view to qualifications of this character.

Notwithstanding the diversity of opinion above alluded to, as to the conclusive quality of the adjustments made by the Auditors and Comptrollers in the Treasury, they were generally acquiesced in, and no very serious question of jurisdiction arose until within the last two or three years. The late war made the expenditures in the Quartermaster's Department many times greater than ever before, and of course as variable in circumstances as they were large in amount. It then began to be stoutly insisted in that Department that claims arising thereunder should be settled in that Department, and that they were not bound by the decisions of the accounting officers of the Government. The number of cases involved in this controversy was so great that the matter was brought to the attention of Congress, and after a very full and careful consideration of the subject it resulted in the passage of the act of March 30, 1868.

The committee do not regard that act as having added at all to the conclusiveness of the decisions made by the accounting officers

of the Treasury beyond what it was under the act of 1817. The only substantial change made by that act was the power given to the head of a Department doubting the correctness of any balance certified to him by such officers to return it for reexamination with any evidence in his possession bearing upon the subject.

It is suggested in the letter of the Secretary that his Department is embarrassed in asking for appropriations by reason of their want of knowledge of the amounts needed for the payment of claims upon it, if the amount is to be fixed by officers of another Department. It is impossible for the committee to see much force in the suggestion. If the estimates are made in advance of the settlement of the claims to this extent, they must be wholly uncertain, by whomsoever they are to be settled, unless the estimate is to furnish arbitrary rule for settlement, which would be unjust. If the estimates are made after settlement there is no uncertainty in either mode of settlement. But if it be true that under this mode of settlement the Department has made underestimates, so that they are not in possession of funds for the payment of claims allowed, the hardship would seem to be upon the claimants, whose payments must be delayed until the Department is in funds.

It is suggested by the Secretary in his letter that in case of disagreement between the accounting officers in the Treasury and the War Department as to the allowance of a claim, the claimant might be sent to the Court of Claims for the balance or the whole of his claim, as the case might be.

Section 7 of an act passed June 25, 1868, seems to provide all that the Secretary de-

sires in this behalf by authorizing the head of any Executive Department, when any claim is made upon his Department and the amount in controversy exceeds $3,000, and in other cases where the questions involved are important, to send such claimant to the Court of Claims.

In the judgment of the committee the present system of public accounting (which has worked so satisfactorily with few interruptions for more than half a century) ought not to be disturbed, and that the act of March 30, 1868, which was designed to prevent such interruptions in the future, was just and wise, and that no necessity exists for its repeal or modification.

* * * * *

The Committee Report on the cited provisions enacted as a part of sections 7 and 8 of the act of July 31, 1894 (Senate Report No. 293, 53rd Congress, 2nd Session, of April 2, 1894, to accompany S. 1831) contains the following explanation:

> Above the six Auditors is placed one Comptroller * * * *mainly to determine finally the construction of statutes* * * *.
>
> *The advantage of having one Comptroller* to stand in the same relation to the Auditors as an appellate court to inferior courts * * * *to make final decisions as to construction of statutes,* is so clear that it requires no argument * * *. Under the system proposed there will be uniform constructions of statutes in the accounting branch of the Government, and the fact that one officer is charged with this judicial duty, and relieved from mere mathematical computations, will be likely to lead to more satisfactory results.

* * * * *

This section also provides that *an Auditor* in passing an account, *having occasion to pass upon a construction of a statute which has not already been construed, or in changing the construction of a statute which has already been passed upon, shall send his decision upon such original construction to the Comptroller* * * *. *This clause is intended to provide the opportunity of presenting to the Comptroller, for his decision, all matters of a legal nature* or matters of importance. * * *

The same section also provides that disbursing officers or heads of the Executive Departments may obtain the decision of the Comptroller upon any question involving a payment to be made by them, which will bind the Auditors and the Comptroller in passing upon the account containing such disbursement. This is intended as a measure of relief for disbursing officers, and also to allow the Executive Departments to know what the action of the Comptroller will be before an expense is incurred by them. (Italics supplied.)

The purposes of the cited provisions of the Budget and Accounting Act are explained in the Senate Report No. 524, 66th Congress, 2nd Session, of April 13, 1920, as follows:

[Senate Report No. 524, 66th Congress, 2d Session]

NATIONAL BUDGET SYSTEM

APRIL 13, 1920.—Ordered to be printed.

Mr. McCormick, from the Special Committee on the National Budget, submitted the following report (To accompany H.R. 9783):

* * * The Comptroller of the Treasury bears an appellate relationship to the six auditors. He reviews, on appeal, settlements made by them in the first instance, and modifies and revises such settlements *in his discretion. He renders advance decisions at the request of disbursing officers and heads of departments and establishments on the applicability of appropriations to specific purposes and on other matters relating to the expenditure of public funds.*

WANT OF COORDINATION

* * * * *

If new provisions are to be made for the accounting establishment of the United States at this or any other time, they should accomplished [sic] a concentration of authority over all Federal accounting activities. * * * They should require this official to keep the Government's books of general accounts of appropriations and funds, of revenues and expenditures, of the public debt, and [illegible] fiscal officers. And they should provide for advance decisions to fiscal officers and to heads of departments, and for the review upon appeal of the settlement of accounts and claims made in routine order. * * *

[House of Representatives Report No. 14, 67th Congress, 1st Session]

NATIONAL BUDGET SYSTEM

APRIL 25, 1921—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Good, from the Select Committee on the Budget, submitted the following report (To Accompany H.R. 30): The Select Committee on the Budget, to which was referred

H.R. 30, report it to the House with a favorable recommendation and submit the following explanation thereof:

* * * * *

The bill creates an independent establishment known as the general accounting office, to which is transferred all the powers and duties now imposed by law upon the Comptroller of the Treasury and the six auditors. The Comptroller of the Treasury and the six auditors under existing law are appointed by the President. Under the present plan the Congress has no power or control over appropriations after they have once been made. It has no knowledge as to how expenditures are made under these appropriations, and inasmuch as the Comptroller of the Treasury and the six auditors owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments. The Executive having the power to initiate the budget, certainly an independent audit is necessary to insure at all times a businesslike execution of the budget.

* * * * * *

The only way by which Congress can hold a check on expenditures is to continue a control and audit of the accounts by an independent establishment. The tenure in office of the comptroller general and the assistant comptroller general is made * * * to secure competent men to occupy the positions and *to make them absolutely independent of the Executive in their decisions. The position is a semijudicial one,* * * *. The creation of this office will enable it to furnish information to Congress and to its committees regarding the expenditures of

the Government. He could and would be expected to criticize extravagance, duplications, and inefficiency in executive departments. He could do this without fear of removal. Under the present plan neither the Comptroller of the Treasury nor the six auditors make such criticism. The reasons why they do not are apparent, yet opportunities for wholesome criticism abound in every department. The creation of this office will, it is seen, serve as a check, not only on useless expenditures but will keep the bureau more keenly alive to a rigid performance of its duties and obligations. It has been urged by some as the most important forward step in the process of wise budgetary reform. (Italics supplied.)

A-40048

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 14, 1933.

The Honorable THE ATTORNEY GENERAL.

In re *Miguel* v. *McCarl, etc., et al.*, Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia, No. 435 in the Supreme Court of the United States.

SIR: There was received by this office September 9, 1933, a copy of the petition above designated stated by counsel for petitioner to have been filed in the Supreme Court of the United States on September 6, 1933, and a copy thereof served upon the Solicitor General of the United States on September 7, 1933. The printed record and briefs filed in the Court of Appeals of the District of Columbia have been furnished to your department

by this office in connection with preparation of the case for trial in that court. (Letter A-40048 to you of April 18, 1933, etc.) The present case now is in a status analogous to that covered by my letter to your department, A-37792, of January 23, 1933, involving the preparation of a brief in opposition to the petition for writ of certiorari, and, as was done in that case, this office, upon request, will be pleased to assign counsel to aid and assist counsel in your department in the preparation of such a brief.

It appears the petition and brief which have been filed are defective in that they do not make a clear, definite, and complete disclosure concerning the controversy arising on the record and contain no concise statement of the special and important reasons on the basis of which the jurisdiction of the Supreme Court of the United States is invoked. Revised Rules of the Supreme Court of the United States 26, 27, and 38, paragraphs 2 and 5 (*c*).

Counsel for the petitioner at page 2 of the petition states that the questions presented are as follows:

> 1. Has the Comptroller General of the United States jurisdiction to review the order of the President acting through the Secretary of War, retiring with pay, after thirty years' service as an enlisted man of the United States Army, a Philippine Scout enlisted in the Army under section 36 of the act of February 2, 1901, 31 Stat. 757?
>
> 2. If the Comptroller General has jurisdiction to review such order of the President, is the right of an enlisted man of the Philippine Scouts, after thirty years' service, to retirement with pay so clear as to render the

decision *contra* of the Comptroller General subject to correction by mandatory injunction?

These are the questions which counsel for the petitioner and representatives of the War Department, appearing *amici curiae* (so stated) in copious briefs and by extended oral argument in both lower courts, indicated it to be their desire to have decided but the facts established on the record do not present any such questions for decision and the findings and opinions delivered both in the Supreme Court of the District of Columbia and in the Court of Appeals are conclusive that no such questions are for decision in the present case. Counsel from the War Department filed a brief in the Court of Appeals of the District of Columbia of 237 printed pages printed at the Government Printing Office at a cost of $531.66 and were allowed to argue *in extenso* by way of supporting such printed brief that such questions were involved and counsel for petitioner likewise argued orally and in printed brief that such were the questions.

The Court of Appeals heard said counsel patiently and after careful consideration unanimously rendered the opinion of June 26, 1933, entirely repudiating the contentions of counsel for petitioner and from the War Department and sustaining in every particular the position set forth in briefs filed on behalf of the Government, particularly the printed brief prepared by counsel in this office by direction of the Solicitor General and filed in the Court of Appeals of the District of Columbia. That brief, copies of which already have been furnished

your department, and the very able and comprehensive opinion rendered by the Court of Appeals (Published 61 Wash. Law Rep. 637–638, of which copy inclosed), doubtless contain the data your department will require for the preparation of a brief in opposition to the petition. The questions actually arising on the record have been settled repeatedly by the Supreme Court as well as by both of the lower courts and—aside from the precedents cited in Government's appeal brief—section 267 of the Judicial Code, act March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384), required a dismissal of the bill. *Hurley* v. *Shanley* (D.C.App.), 60 F. (2d) 335; *Hurley et al.* v. *Kincaid*, 285 U.S. 95; *United States* v. *Lynch*, 137 U.S. 280; *United States* v. *Guthrie*, 17 How. 284; *Decatur* v. *Paulding*, 14 Pet. 497; *Brashear* v. *Mason*, 6 How. 92.

The brief filed by the petitioner is devoted to a discussion of questions which are not in the case and, accordingly, seems to require no particular attention. All of the cases cited on behalf of the petitioner were brought to the attention of the Court of Appeals of the District of Columbia. Cases such as the *Jones*, 18 How. 92, and *Billings*, 23 Ct. Cls. 166, cases, to which the United States was a party, have no application in a suit for mandamus or injunction in which the merits of the claim involved as against the United States, are not for consideration. What has been sought in this case by present and former officers of the Army is a method of controlling the uses and disposition of public moneys through military fiats and the injunctive process so as to nullify and frustrate the constitutional control over the public moneys now

exercised by the legislative branch of the Government through appropriation acts and the duly constituted accounting officers. It was due to just such efforts, emanating principally from the War Department, that the decision of the accounting officers was made conclusive on the executive branch respecting the availability of appropriated moneys, in the absence of a specific statute making administrative determination of status conclusive of right to payment. In re Departmental Reference No. 167, 59 Ct. Cls. 813; Government's Appeal Brief, pp. 22–36, 81–93.

Aside from the fact that it was decided no appropriation had been made in the present case to pay the claim presented, the doubt arising respecting whether the status administratively fixed was authorized by law required reserving the question for judicial decision, in a suit against the United States, where the legal merits of the petitioner's status might be freely examined unhampered by any contentions as to finality of an act of command. The argument which has been made at such great length on behalf of the petitioner in the pending proceedings that the mere administrative retirement of military personnel fixes conclusively the right to pay as against the United States, is of course frivolous; an overwhelming array of precedents having settled that a right to pay in the status administratively determined can only arise when such status is established to be authorized by statutory law, the mere administrative action in that respect being in no wise final in the absence of a specific statute making it so, which is not the present case. *Cloud* v. *United States,* 43 Ct. Cls.

69; *Montgomery* v. *United States,* 19 Ct. Cls. 370; *Jasper* v. *United States,* 38 *id.* 202, 205; *Downes* v. *United States,* 52 *id.* 237, 239; *Hooper* v. *United States,* 53 *id.* 90, 106; *United States* v. *Corson,* 114 U.S. 619; *Mimmack* v. *United States,* 97 U.S. 426; *McElrath* v. *United States,* 102 U.S. 426; *Blake* v. *United States,* 103 U.S. 227; *United States* v. *Symonds,* 120 U.S. 46; *United States* v. *Perkins,* 116 U.S. 483; *United States* v. *Barnette,* 165 U.S. 174; *United States* v. *Allen,* 261 U.S. 317, 320, affirming 56 Ct. Cls. 265. It is not for the Government accounting officers, by allowing payment in cases of doubtful status, to preclude the Government from an opportunity to have the legal merits inquired into judicially. *Mullet* v. *United States,* 21 Ct. Cls. 485; *Charles* v. *United States,* 19 *id.* 316; *Longwill* v. *United States,* 17 *id.* 288, 291–292.

The statement at page 7 of the petition that "Petitioner, Santos Miguel, first enlisted October 1, 1901, in the United States Army" is contrary to the facts established on the record and otherwise is entirely incorrect and misleading. Santos Miguel not only did not enlist in the United States Army in 1901, or subsequently, but his enlistment in the United States Army was specifically forbidden by statutory law and were his claim properly for consideration on the merits in the pending proceeding a judicial decision that the claim of petitioner, aside from any question of availability of an appropriation to pay, is without any legal merit as against the United States, would be unavoidable. In addition to what is said in that connection in the decision on Miguel's claim voucher, 11 Comp. Gen. 275, and in the report to your department,

A-40048 of August 6, 1932, relative to the case of *Santos Miguel* v. *United States*, Ct. Cls. No. 169, Departmental, the point is covered in the letter A-19023/A-24954/A-40048 to you of August 21, 1933, involving the substantially analogous case of Andres Rimorin, as follows:

> By its letter dated March 2, 1933, the Veterans' Administration requested this office to collect from Andres Rimorin, San Fernando, La Union, Philippine Islands, the net balance due the United States on a loan of $110 advanced to him June 22, 1927, on United States Treasurer's check (Veterans' Bureau No. 627) drawn by Joseph F. Routhier, special disbursing agent, on the security of an adjusted service certificate which had been issued to Rimorin through error.
>
> The report is, in pertinent part, as follows:
>
> "1. Under the provisions of Section 305 of the Act approved June 10, 1921, 42 Stat. 24, report of indebtedness is hereby made in the following case, the Bureau having exhausted all usual means of effecting collections:
>
> "2. Person indebted: Rimorin, Andres; present whereabouts: San Fernando, La Union, Philippine Islands.
>
> "3. Identification numbers: A-3,525,522 Cert.-2,743,595
>
> * * * * *
>
> "Upon the certification of this Administration by the War Department of an adjusted service credit in the amount of $500.00, Adjusted Service Certificate #2,743,595, dated February 1, 1925, amount $1,256.00 was issued to Andres Rimorin, A-3,525,522.

He subsequently obtained a loan of $110.00 from the Manila, Philippine Islands Office on the security of the Adjusted Service Certificate, paid by check-voucher #627, dated June 22, 1927, drawn by Joseph F. Routhier, Disbursing Clerk, symbol #99207. *On July 30, 1928, the Adjutant General, War Department, advised that the application for adjusted compensation submitted by the veteran should have been disallowed as he served as a Philippine Scout during the World War, and as such would not be entitled to any benefits under the provisions of the World War Adjusted Compensation Act as amended.*" * * .* (Italics supplied.)

* * * * *

The adjusted service compensation certificate issued to Rimorin was absolutely void by reason that the man's only service appears to have been as an enlisted man in the provisional organization of natives authorized under section 36 of the act of February 2, 1901, 31 Stat. 757, to be organized as Scouts.

It was settled in *Downes* v. *Bidwell*, 182 U.S. 244; *Dorr* v. *United States*, 195 U.S. 138; and in *Balzac* v. *Puerto Rico*, 258 U.S. 298, that the territory constituting the Philippine Islands has not been incorporated in the union or become a part of the United States, as distinguished from merely belonging to it, and that the provisions of the Constitution of the United States and of the general statutes do not apply of their own force to such territory or to the natives thereof unless made applicable by specific language in the statutes (36 Op. Atty. Gen. 170, 172). In recognition of this rule the members of the organization of Philippine Scouts were held exempt from the provisions

of the National Defense Act and of the Selective Draft Act. (27 Comp. Dec. 88; Op. J.A.G. of the Army 322.62 January 3, 1918—Dig. Ops. J.A.G. January 1918, p. 4.). In Treasury Decision No. 31, War Risk, of August 21, 1918, it was held that "neither the *Philippine Scouts* nor the insular force of the Navy, nor the Samoan native guard and band of the Navy, nor any member of either of said organizations, were or are included in, or covered by the War Risk Insurance Act or any part thereof, nor were they intended so to be by the Congress." (Italics supplied.)

The act of July 19, 1919, 41 Stat. 222, made broad provisions for the naturalization, etc., of persons of foreign birth who had served in the military or naval forces of the United States but in decision of May 25, 1925, in the case of *Toyota* v. *United States,* 268 U.S. 402, denying naturalization under the act to Japanese who had been serving in the Coast Guard, upon the ground that this statute applied only to white persons and Africans, the Supreme Court of the United States said that the act of 1919 likewise did not admit of the naturalization of Filipinos. To the same effect is the holding by the U.S. District Court of the Eastern District of Pennsylvania (*In re Alverto,* 198 F. 688) that a citizen of the Philippine Islands who ethnologically was one-fourth white and three-fourths brown or malay could not be naturalized, and the cases of *In re Lampitoe,* D.C. S.D. N.Y., 232 F. 382; *In re Rallos,* D.C. E.D. N.Y., 241 F. 686; *In re Ocampo,* 4 U.S. D.C. Hawaii 686 and 770.

The enlistment of native citizens of the Philippine Islands in the United States Army has been forbidden by section 2 of

the act of August 1, 1894, 28 Stat. 216, which is set forth in 10 U.S.C. 623, as follows:

"In time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intentions to become a citizen of the United States, shall be enlisted for the first enlistment in the Army."

Citizens of the then unincorporated territory of Puerto Rico were declared eligible for enlistment in the Regular Army by the act of March 2, 1903, 32 Stat. 934 (10 U.S.C. 626) but no such provision modifying the prohibition of the cited 1894 act on enlistment in the Army ever was made with respect to native Filipinos such as compose the enlisted force of native scouts.

Thus, not only was the Adjusted Compensation Act not applicable to enlisted members of the native provisional organizations of Philippine Scouts, in the absence of specific language, but the act itself (43 Stat. 122) absolutely forbade the allowing of credit for such service, as follows:

SEC. 202. In computing the adjusted service credit no allowance shall be made to * * *

* * * * *

"(c) Any civilian officer or employee of any branch of the military or naval forces * * * *Philippine Scout*, member of the Philippine Guard, member of the Philippine constabulary * * * member of the insular force of the Navy * * * or Indian Scout [although enlistment of Indian Scouts in Army of the United States not prohibited by cited section 2 of the act of August 1, 1894] in each case for the period of service as such.". (Italics supplied.)

This office will be pleased to render at your request, any further assistance within its means.

In reference to your letter of September 13, 1933, which just now has been received, requesting to be advised of my attitude in the matter of opposition to the petition which has been filed, the statement herein contained is believed to show conclusively that a plain duty lies on the part of all officers of the United States to support the opinion of the Court of Appeals as a correct construction of the law. I would ask the personal consideration of you and the Solicitor General and that you will cause a brief in opposition to the petition to be filed; otherwise that you will promptly advise me in the premises.

Respectfully,

J. R. McCARL,
Comptroller General of the United States.

Inclosure.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 21, 1933.

A-40048.

The Honorable, The ATTORNEY GENERAL.

SIR: There have been received your letters of September 13, 1933, and September 16, 1933, relative to the case of *Miguel* v. *McCarl et al.* (No. 435 in the Supreme Court of the United States), wherein you state that it will be satisfactory to you if I shall cause a brief to be filed in opposition to the petition for a writ of certiorari which has been filed on behalf of the petitioner, Miguel. Your letters state your purpose as being to advise the court your views accord with the claims of the plaintiff

and against those of the officials of the United States upon whom is the duty of deciding the availability of appropriations of the public moneys. It seems essential that the interests and rights of the United States, as well as of this office should be presented impartially to the court in this case and I have assigned to counsel of this office the preparing such brief as may seem appropriate upon receipt from your department of the printed record and of a copy of whatever statement may be filed with the court by your department.

The clerk of the Supreme Court of the United States has advised counsel of this office that in view of the condition of the docket, the matter of the *Miguel* petition will not be for consideration by the court within a month although the time for filing a brief in opposition to the petition will expire on September 27, 1933. The short brief which this office contemplates can be ready for printing within 5 days or less after the receipt of the printed record and statement from your department, and if, at the same time, you will furnish this office with an authorization to have the brief printed at the Government Printing Office under the Department of Justice appropriation involved, it would seem the brief should be ready for filing within about ten or twelve days after receipt of the printed record and statement of the Department of Justice. I would request further that appropriate arrangements as to extension of time for filing the brief in opposition be made under your department and that you will promptly advise me in the premises.

Respectfully,

J. R. McCARL,
Comptroller General of the United States.

Appendix C

Department of Justice,
Office of the Attorney General,
Washington, D.C., September 16, 1933.

The Honorable the Comptroller General
of the United States, *Washington, D.C.*

Sir: Your letter of September 14, 1933, setting forth your attitude in the matter of the petition for a writ of certiorari in the case of *Miguel* v. *McCarl et al* (No. 435 in the Supreme Court of the United States), has been received.

In view of the last paragraph of your letter, I have the honor to inform you that this case has received the personal and earnest attention of both the Solicitor General and myself; and while I regret that our views are not at one with your own as to the merits of the petition, I feel it necessary to state that it is the duty of this Department, as it has always been the practice, to advise the Supreme Court of its convictions regarding the merits and the law applicable to any petition for certiorari submitted.

In view of the course this Department feels constrained to follow, as indicated in our former letter, it will be perfectly satisfactory if you should cause to be filed a brief setting forth your contentions and opposing the granting of the writ.

Respectfully,

Homer Cummings,
Attorney General.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR GENERAL,
Washington, September 21, 1932.

Honorable J. R. MCCARL,
Comptroller General of the United States,
Washington, D.C.

(In re *Miguel* v. *McCarl,* No. 435, October Term, 1933.)

DEAR MR. COMPTROLLER GENERAL: Your letter of September 21st addressed to the Attorney General has been referred to me. I enclose herewith a carbon copy of the statement which I expect to file with the Supreme Court. I also enclose a requisition for the printing of your brief.

I have arranged with counsel for the petitioner that you may have ten days' additional time for filing your brief. This time will expire on October 7th. From your letter I gather that your brief can readily be prepared by that time.

No copy of the printed record is available which can be sent to your office. However, I presume that you already have copies of the record as used in the Court of Appeals. The record in the Supreme Court consists simply of this record, together with the opinion of the Court of Appeals, the judgment and one or two formal matters. It is possible that you may be able to obtain an additional copy of the record from the Clerk of the Supreme Court or from the petitioner's counsel.

Very truly yours,

J. CRAWFORD BIGGS,
Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF the United States, and Frederick W. Coleman, Chief of Finance, U.S. Army

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE COMPTROLLER GENERAL OF THE UNITED STATES

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 10–12, 33) and the final decree for injunction entered by that court (R. 33–34) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 42–48) is reported in 66 F. (2d) 564.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered June 26, 1933 (R. 42–49). The petition for certiorari was filed September 6, 1933, and was granted October 23, 1933. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat., 938–939.

QUESTION PRESENTED

Whether injunction lies in the Supreme Court of the District of Columbia to compel the Chief of Finance as an unbonded subordinate in the War Department, to pay or cause payment to be made and to compel the Comptroller General of the United States to approve and allow credit for the payment of retired pay and allowances to the petitioner, a native Filipino and former enlisted man of the Philippine Scouts, after the Comptroller General of the United States, on application for decision by an Army disbursing officer, before whom a voucher covering such claim for retired pay and allowances was pending for payment, has rendered his decision holding such payment is not authorized under existing appropriations.

STATUTES INVOLVED

The statutes involved, with pertinent legislative and judicial history, are set forth in the brief of the Comptroller General of the United States, filed in

opposition to the petition for a writ of certiorari, at pp. 3–5 and 29–43.

STATEMENT

Special Orders No. 207 of the War Department dated September 3, 1931 (R. 1–2, 13, 42) announced respecting the petitioner as follows:

> 35. Master Sergeant Santos Miguel, R–320883, Service Company, 45th Infantry (PS) will be placed on the retired list at Fort William McKinley, P.I. effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600 A 211–2 (A.G. 220.85) (4–3–21)
>
> By order of the Secretary of War.
>
> DOUGLAS MACARTHUR,
> *General,*
> *Chief of Staff.*

A voucher covering the claim of the petitioner to retired pay and allowances for the month of November, 1931, in the gross amount of $50.81 having been presented to the bonded Army disbursing officer, Headquarters, Philippine Department, for payment, that official, stating his doubts whether payment of the claim was authorized, forwarded the voucher to the Comptroller General of the United States on November 5, 1931, through the Chief of Finance, with request for an advance decision as to the legal authority for payment (R. 15–16, 43).

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This request of the disbursing officer for a decision was forwarded to the Comptroller General of the United States from the War Department, Office Chief of Finance, by a 1st Indorsement of December 16, 1931, asking that the decision when rendered be forwarded to the disbursing officer through that office and advising that the request for advance decision was made "under the authority contained in the act of July 31, 1894 (28 Stat., 208; U.S.C. 31: 74)." (R. 16–17.)

The decision rendered by the Comptroller General to the disbursing officer through the Chief of Finance on January 19, 1932, 11 Comp. Gen. 275, concluded as follows:

> You are not authorized to pay the voucher which will be retained in the files of this office. (R. 17, 24–30, 43.)[1]

On February 15, 1932, the Secretary of War, claiming to act under section 148 of the Judicial Code, requested the United States Court of Claims to review the decision, stating as follows:

> * * * The Comptroller General, on January 19, 1932, rendered his advance de-

[1] The statement in petitioner's brief (p. 3) that on April 3, 1931, he made application in writing to the President that he be placed on retired list and the statement therein as to the manner and form of petitioner's enlistments (pp. 4 and 13 footnote) appear to be "off the record" and have reference to matters not before the Comptroller General in connection with the decision which this Court now, in effect, is asked to review as upon a writ of error (R. 13–14).

> cision to Major Beard, denying the latter's authority to pay said voucher * * *
>
> The War Department finds itself unable to accept or concur in this advance decision of the Comptroller General. * * *

That reference by the Secretary of War is pending before the Court of Claims docketed as Departmental Reference No. 169 (R. 23; Comptroller General's brief in opposition to petition, pp. 9–10). Whether or not the Court of Claims has jurisdiction to decide the question thus presented to it, that Court would have jurisdiction to decide the legal merits of the plaintiff's claim to retired pay and allowances and to give judgment thereon (R. 10, 11, 23).

On April 27, 1932,[2] the petitioner filed his bill for injunction to enjoin the Comptroller General from giving the effect to the decision in the settlement of the public disbursing accounts which the statute under which the decision was rendered requires;

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[2] It is noteworthy that on this same day, April 27, 1932, on the floor of the House (75 Cong. Record 9072) Mr. McDuffie of the Committee on Economy explained the purpose of the economy provision enacted as section 301 of the act of June 30, 1932, 47 Stat. 382, 407, which provides: "The President is authorized at any time to disband the Philippine Scouts or to reduce the personnel thereof."

The explanation of Mr. McDuffie was in reply to a question as follows:

"Mr. BRITTEN. * * * I thought the gentleman had some other data showing the President's suggestions as compared with the suggestions which he is now presenting.

"Mr. MCDUFFIE. * * * There were, of course, some changes. For instance, the President suggested that we cut

also, to require the Comptroller General to return the voucher to the disbursing officer and to compel the Chief of Finance of the Army to pay or cause the voucher to be paid (R. 1–6, 17–18, 43).

The United States Attorney for the District of Columbia filed motions to dismiss the petitioner's bill of complaint (R. 7–10), which motions to dismiss were overruled (R. 10–12), whereupon the Comptroller General answered the bill (R. 12–30). The petitioner moved to strike this answer, which motion was sustained (R. 32, 33) and final decree was entered in the Supreme Court of the District of Columbia (R. 33–35). The Court of Appeals of the District of Columbia reversed this decree and directed dismissal of the petitioner's bill (R. 42–49).

The allegations of the entire answer of the Comptroller General (R. 12–30) are taken as conceded for purposes of ruling on the issues in the record raised by the petitioner's motion to strike and for decree *pro confesso* (R. 32–33). Among other matters the record thus establishes:

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out the Philippine Scouts or have the Philippine Government pay that expense. We eliminated that item from the bill and authorized the President to disband the Scouts, if necessary. He has that authority now, and can save $5,000,000 by disbanding the Philippine Scouts."

The passage of the Philippine Independence Act of January 17, 1933, 47 Stat. 761, in the face of opposition from the Secretary of War (75 Cong. Record 12832) and over Presidential veto (47 Stat. 770) made the provision for disbanding the Philippine Scouts of no immediate importance.

(1) The procedure set forth in the regulations of the War Department, promulgated for the guidance of disbursing officers and other officials of that department in obtaining decisions from the Comptroller General of the United States on questions involving payments to be made by them or under them, was observed by the disbursing officer and the Chief of Finance in obtaining the decision on the petitioner's claim for payment (R. 18–20).

(2) *It has been the practice (which is undisputed and otherwise abundantly appears from the decided cases) of the Comptrollers followed without interruption, at least since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether a payment on a claim is authorized to be made under appropriated moneys of the United States, except in those rare cases where the Congress, by specific language, has made the finding or decision of some other official conclusive in that respect* (R. 20).

(3) The Comptroller General did not coerce or even invite the application of the disbursing officer and the Chief of Finance for an advance decision, nor has he interfered with the performance by them of their official duties (R. 15–17, 20).

(4) The Chief of Finance does not function as a bonded disbursing officer (R. 21).

(5) The Comptroller General had no knowledge or information sufficient to form a belief (and the

record contains no evidence) that the petitioner applied to the President for retirement and was by direction of the President placed on the retired list (R. 13).

(6) The Congress has never specifically provided any appropriation authorized to be used for payment of retired pay and allowances to enlisted natives of the Philippine Scouts, and the War Department has never brought to the attention of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contemplated or had been accomplished (R. 21–22).

(7) No appropriated moneys are available to pay the petitioner retired pay and allowances (R. 21, 22, 23, 47, 48).[3]

(8) There has been no unlawful or improper failure, omission, or refusal to pay petitioner retired pay (R. 22–23).

The answer of the Comptroller General, moreover, categorically and repeatedly denied the allegations of the petitioner's bill of complaint that the petitioner is entitled to retired pay and allowances and the allegations and conclusions thereof that appropriated moneys of the United States are available and authorized to be used for making payment of such retired pay and allowances to

[3] The statements in petitioner's brief (pp. 7 and 35–36) concerning balance available in appropriation "Pay of the Army", 1932, if material, are not supported by the record.

the petitioner as well as the allegations and conclusions of the bill that the petitioner has been retired in accordance with existing laws and that he is entitled under the laws to retired pay and allowances as claimed by him (R. 12–24).

On May 10, 1932, the then Attorney General addressed a letter to the Secretary of War concerning his understanding as to the nature of the petitioner's present proceeding, in pertinent part as follows:

> There are many suits brought in the District and elsewhere against officers of the United States which involve matters in which the United States alone is really interested. *A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as much a suit against the United States as if the United States were named a party.* The officers named as defendants have no personal interest whatever in the controversy. It is the established practice in such cases for the Attorney General to take charge of the *defense* of such cases, the appearances for the defendant officials being made by the United States Attorneys.
>
> * * * * *
>
> Under these circumstances it seems appropriate for me to confirm my oral request that the answer or return interposed for the Chief of Finance in the Miguel case by the

officials of the Judge Advocate General's Department be withdrawn, and that any answer or return required to be filed, be filed by the United States Attorney. *I am informed that the United States Attorney suggests that there are grounds on which this suit ought to be dismissed independent of the merits and that the return interposed for the Chief of Finance by the Judge Advocate General's office would seriously embarrass him in the position he has taken.* * * * (Italics supplied.)

SUMMARY OF ARGUMENT

1. The statutory laws of the United States not only authorized, but required, the Comptroller General of the United States to render his official decision on the question on which his decision was requested by the Army disbursing officer, of whether payment was authorized on the voucher covering the petitioner's claim for retired pay and allowances.

2. The record does not show any facts establishing it is the plain legal duty of the Chief of Finance, United States Army, to pay, or to cause any bonded disbursing officer to pay, retired pay and allowances to the petitioner.

3. A decree for injunction in accordance with the prayers of the petitioner's bill would be contrary to law.

ARGUMENT

I

This Court will notice that what primarily is brought in question by the petitioner is the constitutional control (Article 1, section 9, clause 7) by the legislative branch over the uses of public moneys, as maintained through the appropriation acts and the duly constituted accounting officers and that there is not involved any personal interest of the Comptroller General. The form of the proceeding here adopted by petitioner has for its object the frustration of such legislative control over public moneys by the coercion of a subordinate administrative official to make payment to petitioner on his disputed claim against the United States for retired pay under a general appropriation not conceded to be available for such purpose, as contrasted with the procedure which has been authorized by Congress under the Tucker Act of a suit on the merits in the Court of Claims, as to which any judgment obtained by the petitioner would be for submission to the legislative branch for an appropriation; payment thereunder to be made on settlement by the General Accounting Office.[4]

[4] Act September 30, 1890, 26 Stat. 537, as amended (31 U.S.C. 226); act February 18, 1904, 33 Stat. 401, as amended by section 304, act June 10, 1921, 42 Stat. 24 (31 U.S.C. 228); section 13 of Title II, act March 3, 1933, 47 Stat. 1516, amending the act of March 3, 1875, 18 Stat. 481 (31 U.S.C. 227; see, also, act April 10, 1928, 45 Stat. 413).

The Court of Appeals for the District of Columbia (R. 46–47; 66 F. (2d) 56[illegible] held:

> * * * The Comptroller General when applied to by the disbursing paymaster of the Army, was required by law to decide the question of appellee's [petitioner's] right to retired pay. The right was regarded as doubtful by the disbursing officer, and in order to protect himself * * * if payment should ultimately be held not valid, he applied in accordance with law, to the Comptroller General for an advance opinion. * * *

The Court of Appeals (R. 48; 66 F. (2d) 567) further held:

> * * * The decision of the Comptroller General, however, does not affect the status of the petitioner so far as the retirement order is concerned, and that question need not be passed on. The Comptroller General's action affects merely his right to retired pay, and that depends upon whether Congress has provided the right to such retired pay and has made an appropriation accordingly. As to that the Comptroller General, in his capacity as head of the accounting office of the government, has the right of determination, for it is unlawful for any sum to be paid out of the Treasury of the United States except according to law, and the duty of the Comptroller General is primarily to determine that question. * * *

On this, the petitioner's brief under Point VIII of the Argument (p. 35) says:

> The matter of the availability and application of an existing appropriation to the discharge of the petitioner's retired pay was a question within the jurisdiction of the Comptroller General; and until overruled by the Courts, his position upon this phase of the case is admittedly binding.
>
> * * * Being within the scope of his lawful jurisdiction, the Courts will not disturb it, unless it be arbitrary and capricious, unreasonable, or clearly and obviously wrong. * * *

A 237-page printed brief was filed, *amici curiae,* in the Court of Appeals of the District of Columbia by able counsel from the War Department, Office of the Judge Advocate General, urging the merits of petitioner's right to be retired and to be paid retired pay and allowances forthwith, out of public moneys. The petitioner's chief counsel, a former acting Judge Advocate General of the Army, likewise filed a printed brief and the four judges who sat in the Court of Appeals heard said counsel from the War Department and petitioner's counsel at length (R. 41, 42). No brief or argument on the merits of the petitioner's right to retirement, etc., was presented on behalf of the Comptroller General by reason that counsel in the General Accounting Office and in the Office of the United States Attorney for the District of Columbia who appeared

in the case did not regard the merits of the petitioner's claim against the United States for retired pay and allowances as open to inquiry, in this *ex parte* proceeding thereon.

The four judges of the Court of Appeals were unanimous in holding that the order of retirement promulgated by the Chief of Staff, at the direction of the Secretary of War, was not a conclusive finding that petitioner is a retired soldier, but that at best the status which petitioner claims is doubtful, and that the decision of the Comptroller General denying petitioner's right to pay constituted a reasonable and proper decision, conclusive so far as the executive branch of the Government is concerned.[5]

It is conceded on the record (R. 20) before this Court that the decision of the Comptroller General on the claim of the petitioner—

> * * * followed a practice which the Government accounting officers have fol-

[5] During the argument Justice Van Orsdel of the Court of Appeals, inquired of counsel for the Comptroller General whether a practice had obtained to recognize as conclusive a retired status as determined administratively and was cited by counsel to the case, among others, of *Cloud* v. *United States*, 43 Ct. Cls. 69, 81, wherein as Assistant Attorney General, in a suit for retired pay brought by an Army officer against the United States under the Tucker Act, where the merits of the claim to retired pay were open to inquiry, the Justice himself had made substantially the argument to the Court of Claims which the War Department was making in the case of petitioner, that administrative action is conclu-

> lowed without interruption, at least, since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether payment on a claim is authorized under existing appropriations, except only in those rare cases where the Congress has by specific language made the finding or decision of some other official conclusive on the question of whether payment is authorized.

The Congress has plainly expressed its purpose in the statute when it has been intended to make the action of some executive or administrative official conclusive on the accounting and disbursing officers in the matter of payment from the Treasury; for example, section 305 of the World War Adjusted Compensation Act (43 Stat. 124), provided:

> Immediately upon the enactment of this Act the Secretary of War and the Secretary of the Navy shall ascertain the individuals who are veterans * * * and, as to each veteran the number of days of oversea serv-

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sive on question of retired status. In accordance with many decided cases the Court of Claims held (43 Ct. Cls. 69) that the question of right to retired pay is not controlled by administrative or executive action but that rank as well as pay of retired persons is entirely within the control of Congress, it being the law which is for consideration in adjudicating a claim for retired pay. This Court will notice, moreover, that none of the scores of such decided cases ever could have reached the courts for judicial decision on the merits as to legal status or pay under the view contended for by the petitioner.

> ice and of home service * * * for which he is entitled to receive adjusted service credit, and their findings shall not be subject to review by the General Accounting Office, and payments made by disbursing officers of the U.S. Veterans' Bureau made in accordance with such findings shall be passed to their credit.

It will be noticed, however, that in this instance where the Congress vested the final discretion of deciding the law for the Executive Branch, as to former military personnel, in the Secretary of War the Congress itself by most specific language in section 202 of the same act (43 Stat. 122) limited the discretion of the Secretary of War by providing he should not recognize service as an enlisted man in the Philippine Scouts such as the petitioner bases his claim for retired pay and allowances upon, the language of the act in this respect being as follows:

> SEC 202. In computing the adjusted service credit no allowance shall be made to—
>
> * * * * *
>
> (c) Any civilian officer or employee of any branch of the military or naval forces * * * *Philippine Scout,* member of the Philippine guard, member of the Philippine Constabulary, member of the National Guard of Hawaii, member of the insular force of the Navy, member of the Samoan native guard and band of the Navy, or Indian Scout—in each case for the period of service as such. (Italics supplied.)

The act of May 23, 1930, 46 Stat. 375, made certain action of the Secretary of the Navy conclusive, both on the courts and on the disbursing and accounting officers of the United States, involving the retirement and transfers to the reserve forces of certain personnel under his jurisdiction.[6]

Prior to this act specifically making the action of the Secretary of the Navy conclusive, questions as to the validity of such assignments of grades and ratings and of retirements and transfers to the Reserve Forces had been decided, under jurisdiction vested by general statutes, in the United States Court of Claims, in the Office of the Attorneys General and in the Government accounting offices. *Lawless* v. *United States,* 59 Ct. Cls. 224; *Garrison* v. *United States,* 59 Ct. Cls. 919; *Beeman* v. *United States,* 65 Ct. Cls. 431 (all denying claims against the United States for pay for service rendered, on the ground appointments or promotions under Navy

[6] Section 1, act of March 8, 1928, 45 Stat. 248, as amended (39 U.S.C. 465a), provides that in the award and interpretation of certain contracts for air-mail service the decision of the Postmaster General shall be final and not subject to review by any officer or tribunal of the United States except by the President and the Federal Courts. Likewise, in section 10t, act July 2, 1926, 44 Stat. 784, 788–789, as amended (10 U.S.C. 310t), it is provided the decision of the Secretary of the department concerned as to the award, interpretation, application, and administration of contracts for aircraft, aircraft parts, etc., shall not be reviewable, otherwise than in the act provided, by any officer or tribunal of the United States except the President and the Federal Courts.

Department to grade or rank in which pay was claimed, were invalid in each case); 31 Op. Atty. Gen. 173; 24 Comp. Dec. 659, 660; 25 *id.* 696; 4 Comp. Gen. 636; 10 *id.* 66–69.

The right of the Comptroller General to decide pay rights based on such assignments or promotions under the Navy Department before the act of May 23, 1930, 46 Stat. 375, became effective making the action of the Secretary of the Navy conclusive, was challenged in a proceeding for mandamus brought in the Supreme Court of the District of Columbia, *Arthur Edward Davies* v. *The Comptroller General of the United States, The Treasurer of the United States, The Secretary of the Treasury, and The Secretary of the Navy,* Law No. 77476. The answer of the Comptroller General in that case was filed January 15, 1930, and the record shows that the petitioner, Davies, entered the Naval Service as an enlisted man August 21, 1895, served in enlisted grades in the Navy and in the Army, and in warrant and commissioned grades in the Navy and in the Naval Reserve Force until October 2, 1920, as of which date, having been found by a Naval Retiring Board to be incapacitated for active service and by direction of the President, he was placed on the retired list of the Naval Reserve Force in the grade and rank of lieutenant.[7] When the account of Davies came before

[7] This retirement was announced as in conformity with the provisions of section 2, act June 4, 1920, 41 Stat. 834.

the Comptroller General the official service record presented in support of the account did not establish that the requirements of law as to examination, etc., had been complied with in connection with Davies' appointments and promotions in commissioned grade and accordingly it was held in connection with the settlement of the account that Davies was not entitled to the retired pay of a lieutenant. The mandamus proceeding was for the purpose of compelling payment to Davies of the retired pay of a lieutenant.

Justice Bailey of the Supreme Court of the District of Columbia entered judgment on the demurrers to petitioner's traverse of the respondents' answers and dismissed the petition with costs against petitioner entering his opinion April 25, 1930, by written endorsement in the file, as follows:

> The rights claimed by the petitioner are not, in my opinion, so clear as to justify the issuance of the writ of mandamus. His rights if any, should, I think, be set up in the Court of Claims.
>
> The demurrer's to the traverse will be sustained.

The counsel representing petitioner in the present proceedings heretofore has endeavored to have the Supreme Court of the District of Columbia

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authorizing retirement of reserve and temporary officers of the Navy who had incurred disability in line of duty under the same conditions provided for officers of the Regular Navy (sections 1448 to 1457, Revised Statutes).

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assume the duties enjoined by law upon the General Accounting Office and the Comptroller General of the United States in the case (Equity No. 47040) of James R. Jacobs, a retired major, U.S. Army, wherein mandatory injunction was sought against Dwight F. Davis as Secretary of War and Kenzie W. Walker as Chief of Finance, U.S. Army, to compel them to pay the retired major the rate of pay he conceived himself entitled to, and a prohibitory injunction against the Comptroller General of the United States to enjoin the latter from settling the accounts in accordance with law. In that case there had been a withholding of the pay the accounting officers had found to be due the major and application thereof to adjust prior overpayments made to him. Counsel for the petitioner read to the court an exhaustive typewritten brief endeavoring to establish that the court, having jurisdiction of the case under *McCarl* v. *Pence,* 18 F. (2d) 809, to direct payment of the pay so withheld, should do full justice and direct the future payment of retired pay to Major Jacobs at $300 per month, the rate he conceived the law entitled him to receive, instead of at $225 per month, the rate determined to be due him, under the applicable statutes, by the General Accounting Office. Justice Hoehling, who decided the *Cox case,* (8 F. (2d) 669, certiorari denied 270 U.S. 652), in that court, entered a memorandum opinion in the *Jacobs case* on November 21, 1927, which, insofar as it involves the rights of officers and enlisted men

to have that Court determine the rates of pay due them, it would seem should have been accepted by that court as controlling of the present proceedings. The opinion in pertinent part is as follows:

> *Aside from the question of the deductions so made from plaintiff's salary, it is insisted by plaintiff that, under the provisions of applicable law, his salary, while on active duty, should be $300 per month, whereas defendants insist that his lawful salary is but $225 per month. Accordingly, plaintiff seeks injunctive relief herein; (a) fixing his salary, accrued and accruing, at the rate of $300 per month* [italics supplied]; and, (*b*) concerning the deductions so heretofore made from his pay, under the stoppage orders, *supra*.
>
> *So far as concerns ground (a) the Court is of opinion that the same is not properly the subject of relief herein; and, as to that, the decree to be entered herein shall be that the bill is dismissed, but without prejudice to the right of plaintiff to file appropriate suit for the recovery of such additional amounts of salary, accrued and accruing, as he may conceive himself lawfully entitled to receive.* (Italics supplied.)
>
> As to said ground, (*b*) the decree may provide for payment of the amount of deductions so made from plaintiff's pay, by reason of the stoppage orders complained of herein. (*Pence* v. *McCarl et al., 55 Wash. L.R. 414.*)
>
> A. A. HOEHLING, *Justice.*
>
> NOVEMBER 21, 1927.

Numerous proceedings by injunction were brought in the Supreme Court of the District of Columbia (by counsel representing the petitioner in this case) against the Comptroller General and the Director of the Veterans' Administration with the object of compelling payment of double retired pay to retired emergency officers [8] who also had a retired status in the regular services. The bills of complaints in those cases were dismissed and none were appealed except the case of *Stradley* v. *McCarl etc. et al.,* Equity No. 51073, in which Justice Stafford dismissed the bill of complaint on March 24, 1930. The appeal to the Court of Appeals of the District of Columbia (No. 5223) was dismissed by the present petitioner's counsel after that Court had decided the case of *U.S. ex rel. Bowling* v. *Hines,* 50 F. (2d) 330, to which latter case the Comptroller General was not a party.

In a decision entered by Mr. Chief Justice McCoy June 10, 1927, in a mandamus proceeding against the Comptroller General wherein there was sought to have the Supreme Court of the District of Columbia review, as on writ of error, the action of the respondent, Comptroller General of the United States, in reference to his official duties, *United States ex rel, Metellus Thomson, Jr.* v. *J. Raymond McCarl, Comptroller General of the United States,* At Law No. 73173, the rule heretofore recognized as controlling of such cases brought in the Supreme

[8] Act May 24, 1928, 45 Stat. 735.

Court of the District of Columbia is concisely stated, as follows:

> Relator demurs to the answer of respondent to a rule to show cause why a writ of mandamus should not issue directing the respondent to transmit or cause to be transmitted to relator a check of the United States for certain amount claimed to be due him.
>
> * * * * *
>
> The court is asked to tell the Comptroller how to proceed. It is well settled that this may not be done. See *United States* v. *Lynch,* 137 U.S. 280. This point was not decided in that case, but the opinion refers to the decision of this court to that effect which it was sought to review. The point is decided in many cases and adversely to relator's contention.
>
> A direction to the respondent as asked would be futile. *Howden & Co.* v. *Standard Shipbuilding Corporation,* 17 F. (2d) 530.
>
> The demurrer is overruled.

The ruling of the Supreme Court of the District of Columbia in the present case, in failing to recognize that it was the statutory official duty of the Comptroller General to decide the question of petitioner's right to pay thus was in conflict with the precedents of that Court.

The ruling of the Supreme Court of the District of Columbia in the present case likewise was in conflict with the decisions of the Court of Appeals of the District of Columbia holding that the duty of

the Comptroller General of the United States to decide for the executive branch of the Government whether payment on a claim against the United States is authorized involves judgment and discretion which will not be controlled by mandamus or injunction.

U.S. ex rel. L. Margulies & Sons, Inc., v. *McCarl*, 10 F. (2d) 1012, 56 App.D.C. 147, certiorari denied, 273 U.S. 696.

McCarl v. *Walters*, 59 App.D.C. 237, 38 F. (2d) 942.

McCarl v. *U.S. ex rel. Leland*, 59 App.D.C. 362, 42 F. (2d) 346, certiorari denied, 282 U.S. 839.

McCarl v. *Rogers*, 60 App.D.C. 111, 48 F. (2d) 1023.

McCarl v. *Hoeppel*, No. 5945 App.D.C., decided December 18, 1933, and set forth in Appendix A, pp. 57–59, *infra*.

The proceeding of the petitioner by injunction to recover retired pay as a retired enlisted man of the U.S. Army, which the Comptroller General of the United States has decided is not authorized to be paid under existing laws and appropriation acts, has no support from cases such as *Smith* v. *Jackson*, 241 Fed. 747, 761, affirmed 246 U.S. 388; *McCarl* v. *Cox*, 8 F. (2d) 669, certiorari denied 270 U.S. 652; and *McCarl* v. *Pence*, 18 F. (2d) 809, for in those cases, as decided, there was no dispute that the plaintiffs were officers of the United States, that the Government accounting and disbursing

officers had determined the plaintiffs were entitled to the sums claimed as pay or salary; that an appropriation was available in the hands of the defendants from which to make the payments; and that it was the duty of the defendants to make the payments as claimed. The only dispute in those cases was whether under such circumstances defendants had authority to withhold the pay or salary so determined as due and apply it, against plaintiffs' wills, to debts defendants alleged were due from plaintiffs to the United States on other accounts but which indebtedness the plaintiffs denied.

In the present proceeding there is no such situation, but it is the question whether the petitioner is entitled to retired pay and allowances which is in dispute between the petitioner and the Government accounting and disbursing officers. The distinction between the present case and the cited cases of *Jackson, Cox,* and *Pence* was so clearly stated by the then Solicitor General (William D. Mitchell), in his memorandum of December 17, 1927, directing appeal to the Court of Appeals of the District of Columbia in the cited case of *McCarl* v. *Rogers*—wherein the Supreme Court of the District of Columbia had issued mandatory injunction directing payments to be made by the Secretary of the Navy to a Navy officer who had filed a claim for refund under the act of May 26, 1926, 44 Stat. 654—that

the following extracts therefrom are suggested as a correct exposition of the law:

> It is for the General Accounting Office to determine in the first instance whether the conditions specified in this Act have been complied with and whether the facts exist which authorize payment of the withheld pay. If he decides against the officer, the latter's remedy is an action in the Court of Claims * * * under the Tucker Act to recover compensation, and in such litigation his right may be determined by the courts and the action of the accounting officers thus reviewed by the courts. I do not believe that the question whether the facts exist or the conditions have been complied with, which are specified in the Act of May 26, 1926, as conditions precedent to the payment of the withheld compensation, may be inquired into by a court in a mandamus or injunction suit against the accounting or disbursing officers any more than could the merits of the Government's claim for refund of the dependency allowances be considered in *Cox* v. *McCarl* and like cases.
>
> * * * * *
>
> Where the statutes fix the officer's compensation and direct it to be paid and appropriate money for its payment, *and the fact that a man is an officer and the amount of his compensation and availability of the appropriation have all been determined and settled by the accounting and disbursing officers,* there is nothing left for them to de-

cide, and in the absence of any statute authorizing withholding pay for claims of the United States, they may be compelled by mandamus or mandatory injunction to obey the mandate of the law. But the moment there is introduced such elements as are brought into this case by the Act of May 26, 1926, and the pay is by statute directed to be withheld unless certain facts are found to exist and certain conditions are complied with, a decision by the accounting officers upon the claim is made necessary, and *while the decision of the accounting officers is not final and conclusive in the sense that it is not subject to review in any court, and although it may be reviewed in an action brought by the officer in the Court of Claims * * * under the Tucker Act, there is no support for the claim that the merits of the officer's right under such a statute as that of May 26, 1926, may be passed on in a mandamus or injunction suit.* I think, this distinction between cases like *Cox* v. *McCarl* and the present cases is clear. *The only reason mandamus or injunction was allowed in those cases was because there was nothing to decide and no question of the merits to be considered.* (Italics supplied.)

The rule was stated similarly by the late Chief Justice Taft at page 81 of his book, *Our Chief Magistrate and His Powers,* where it is said:

Then consider the drawing of money from the Treasury Department under an appro-

> priation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his case into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the government have no appeal, and his decision is final.

One case, on all fours with the present case, appears to have come before this Court wherein the accounting officers of the Treasury, to the duties of whom the General Accounting Office and Comptroller General have succeeded, were attempted to be directed, through the extraordinary writ of the Supreme Court of the District of Columbia, to decide a disputed claim in a particular way.

In that case, the case of *United States ex rel., Lisle* v. *Lynch* (1890), 137 U.S. 280, in affirming on writ of error a judgment of the Supreme Court

of the District of Columbia dismissing a petition for mandamus to compel the Government accounting officers to audit the mileage account of a Navy officer and to issue a warrant to pay the same in an amount the officer conceived to be due him, Mr. Chief Justice Fuller, delivering the opinion of this court, after reviewing the statutes fixing the duties of the Government accounting officers with respect to the public accounts, said (pp. 285–287):

> It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the Act of 1835 and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. * * *
>
> We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that, in the exercise of a valid authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this court in another case.
>
> * * * * *
>
> *The contention of the relator is that the interpretation he puts upon the Act is too obviously correct to admit of dispute and*

> *that this court has so decided;* but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. *What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant.* * * *
>
> Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller, other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case. (Italics supplied.)

That a claimant may not have a mandamus or mandatory injunction in the Supreme Court of the District of Columbia to compel payment to him of pay or salary he conceives due him, but right to which the Government accounting and disbursing officers question, was settled also in the case of a Navy officer, *Brashear* v. *Mason* (1848), 6 How. 92, wherein, after reciting the manner in which public moneys are authorized to be disbursed, it is stated:

> It will not do to say that the result of the proceeding by mandamus would show the title of relator to his pay, the amount, and whether there were any moneys in the treas-

> ury applicable to the demand, for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals.

The following support the same rule:

United States ex rel., Goodrich v. *Guthrie,* 17 How. 284.
Decatur v. *Paulding,* 14 Pet. 497.
Case v. *Terrell,* 11 Wall. 199.
Hagood v. *Southern,* 117 U.S. 52, 71.
22 R.C.L. 492, 494 (secs. 172, 173).

It is not necessary that every reason be legally sufficient or correct which is assigned by an officer of the United States in the course of arriving at his decision on a matter committed to his official discretion. Even when a wrong reason is given by such officer for his decision, that constitutes no ground for the Supreme Court of the District of Columbia to require him by mandamus or injunction to revoke the decision: *Denby* v. *Berry,* 263 U.S. 29, 36; *United States ex rel., Lisle* v. *Lynch,* 137 U.S. 280, quoted *supra.*

The settled rule respecting the official decision of an officer of the United States has been succinctly stated by this Court in *United States ex rel.*

Riverside Oil Company v. *Hitchcock*, 190 U.S. 316, 324–325, as follows:

> * * * Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

When consideration is had of the rule which has been adopted by the courts that the United States is bound by a decision of the Comptroller allowing active pay or retired pay to those claiming as officers or employees of the United States, whereas the claimants' substantive legal rights are not affected but they are left free to proceed against the United States in the Court of Claims to have their rights judicially decided (*St. Louis, Brownsville & M. Ry. Co.* v. *United States*, 268 U.S. 169, 173–174; *United States ex rel. Skinner and Eddy. Corp.* v. *McCarl*, 275 U.S. 1), it becomes even more clear why the courts have declared the Comptroller General may not be directed by mandamus or injunction to decide a claim, presented for his decision, in a particular way.

In the case of *McElrath* v. *United States*, 102 U.S. 426, it appeared that by order dated June 19, 1866, the Secretary of the Navy, G. Wells, dismissed First Lieutenant Thos. L. McElrath from his office

in the U.S. Marine Corps. By order of July 10, 1873, Secretary of the Navy Robeson revoked the order of dismissal and by order of January 8, 1874, accepted Lieutenant McElrath's resignation effective July 10, 1873 (12 Ct. Cls. 203–204). In January 1874 McElrath presented his claim to the Fourth Auditor of the Treasury, for pay as an officer, and the Fourth Auditor and the Second Comptroller of the Treasury (to the powers and duties of whom the Comptroller General has succeeded, with the added proviso they "shall * * * be exercised without direction from any other officer", section 304, act June 10, 1921, 42 Stat. 24, 31 U.S.C. 44), after examining the law and the facts (argument for claimant 12 Ct. Cls. 207) found due and certified for payment to McElrath over $6,000 as half pay and allowances of a first lieutenant of Marines for the period June 21, 1866, to July 10, 1873. McElrath accepted the payment declaring at the time he believed the sum was not the entire amount due him (12 Ct. Cls. 204–205) and then brought his suit in the United States Court of Claims for the difference between *full* pay and allowances and the amount the Government accounting officers had found due him (12 Ct. Cls. 205). The United States Court of Claims decided (p. 214), that McElrath was not an officer in the Marine Corps during the period covered by his claim and gave judgment in favor of the United States for what the Government accounting officers

(Fourth Auditor and Second Comptroller) had allowed and certified for payment to him under a mistaken construction of law (12 Ct. Cls. 201). In affirming the judgment (102 U.S. 426, 441) this Court pointed out that *had claimant McElrath rested on the settlement of the Government accounting officers he might have been entitled to invoke the rule that money paid in mistake of law cannot be recovered* but that his suit—

> invites the court to go behind that settlement, to reexamine all the questions arising out of the claim of appellant for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government—

and, therefore, the Government having met him on his own chosen ground was entitled to recover the payment made to him without authority of law.

This case plainly recognizes the duty resting upon the accounting officers of the Government (now the General Accounting Office and the Comptroller General) to inquire into the legal status of one claiming compensation or salary on the basis of a claimed military status and illustrates how great prejudice may result to the United States if the accounting officers make a mistake of law and certify an amount for payment when no payment is authorized by statute, as well as the reason the Government accounting officers feel bound to reserve doubtful questions of legal right to payment

for decision by the judiciary in authorized proceedings under the Tucker Act, as was done in the case of *Geddes,* 38 Ct. Cls. 428, and as the Court of Claims declared in that case "they properly might do" (38 Ct. Cls. 442).

In *Mullett* v. *United States,* 21 Ct. Cls. 485, the Court of Claims laid down the absolute rule, that except in cases like the *McElrath case, supra,* in which the payee himself brought an action at law on the identical claim settled and decided by the Government accounting officers, thus opening it for judicial adjustment, or in a case where fraud or mistake of fact is established, the United States may not recover unauthorized payments made pursuant to settlements or decisions of the Government accounting officers on their mistaken construction of the law.

None of the several hundred suits for pay and allowances which have been filed in the United States Court of Claims by those claiming as officers, enlisted men and employees of the United States ever would have been brought, during more than 70 years since that Court was established, if the Government accounting officers had not previously exercised their discretion thereon to decide against payment of the claims, because they found no appropriation available for payment or found the legal rights asserted against the United States of such doubtful validity that it seemed incumbent to reserve the question for judicial deter-

mination in a suit brought directly against the United States under the Tucker Act.

The cases of *Longwill* v. *United States,* 17 Ct. Cls. 288, 291, *Charles* v. *United States,* 19 Ct. Cls. 316, 319, *Geddes* v. *United States,* 38 Ct. Cls. 428, 442–445, and *Ex parte Rock,* 171 Fed. 240, 241–242; among other cases decided since the act of 1868 (15 Stat., 54), unequivocally declare the duty of the accounting officers to refuse to authorize payment under existing appropriations on a doubtful claim and to reserve the question (claim) for judicial decision in the courts under the Tucker Act.

II

The record does not present any facts establishing it to be the plain legal duty of the Chief of Finance, an unbonded subordinate in the War Department, to pay or to cause any bonded disbursing officer to pay retired pay and allowances to the petitioner.

The Court of Appeals held (R. 47; 66 F. (2d) 564, 566) that the opinion of the Comptroller General was given that payment of retired pay and allowances to the petitioner is not authorized, and once given is binding on the executive branch of the Government, citing in support of its ruling the case of *Skinner & Eddy Corporation* v. *McCarl,* 275 U.S. 1. The rule likewise is settled by practice and precedent that after the Comptroller General had given his decision that payment of the

petitioner's claim is not authorized all officers of the United States were chargeable with knowledge that the payment could not be made under existing appropriations and that the claim is not further for consideration in the executive branch of the Government. *Southern Pacific Co.* v. *United States,* 268 U.S. 263, 265; *Anderson's case,* 59 Ct. Cls. 813, 61 *id.* 201; 21 Op. Atty. Gen. (McKenna) 530, 531; 22 *id.* 581; 23 *id.* 431; *id.* 586, 24 *id.* 85; *id.* 553; 25 *id.* 185; *id.* 614; 26 *id.* 431; *id.* 609; 33 *id.* 265; *id.* 268; *id.* at page 385.

In the case of *Southern Pacific Co.* v. *United States,* 268 U.S. 263, the question was material on what basis payments for transportation were made to the railroad company. This Court (p. 265) said:

> It had been previously ruled by the Comptroller of the Treasury that such persons were to be regarded as troops of the United States and that their transportation could be paid for only on land-grant rates; *and disbursing officers, as the claimant knew, were authorized to make payments on that basis only.* * * * (Italics supplied.)

The Court of Claims, *In Re* Departmental Reference No. 167, decided June 9, 1924, 59 Ct. Cls. 813, considered the question in all its aspects. That case involved the claim of Hubert C. Anderson, a customs official, for subsistence expenses in accordance with a Treasury Department Regulation, and the Treasury Department approved the claim for payment in the full amount. When the account

containing the claim came before the Comptroller General for decision it was decided the Treasury Regulation was contrary to law and that Anderson was entitled to payment in a lesser amount than claimed. The Secretary of the Treasury, purporting to act under section 148 of the Judicial Code, referred the claim to the Court of Claims for a decision just as was done February 15, 1932, by the Secretary of War in the case of the present petitioner's claim (R. 23). The Court of Claims agreed with the Government's contention that the Secretary of the Treasury had not power to settle or pay the claim in excess of what the Comptroller General had decided was authorized to be paid and decided further as follows:

> The disallowance of part of the claim of Hubert C. Anderson was reviewed by the Comptroller General of the United States at the request of the Treasury Department, and the settlement was sustained by his decision rendered December 8, 1923. This ruling is conclusive upon the executive branch of the Government by virtue of the Dockery Act of 1894 and the act of June 10, 1921, 42 Stat., 24. *There being no authority after this decision by the Comptroller General for the* Treasury *Department to settle or pay the claim* it cannot be transmitted by the Secretary under section 148. * * *
>
> * * * * * *
>
> *It is perhaps unnecessary to add that nothing herein said is intended to affect the right*

of any claimant asserting an independent claim against the Government. (Italics supplied.)

Subsequently, the claimant, Hubert C. Anderson, filed his claim directly in the Court of Claims and the Court of Claims decided that he could not recover, on the same ground that the Comptroller General had decided the claim was not authorized to be paid. *Anderson* v. *United States,* decided November 16, 1925, 61 Ct. Cls. 201.

The opinion of the court, In re Proposed Reference by the Secretary of the Navy, decided April 8, 1918, 53 Ct. Cls. 370 (before the passage of the Budget and Accounting Act of June 10, 1921), which gave consideration to a claim for pay, as a commissioned officer, of Chief Machinist Albert A. Hooper, is to the same effect as 59 Ct. Cls. 813, *supra.* In the *Hooper case* the Navy Department, basing its views on an opinion given by the Judge Advocate General of that Department, insisted that Hooper was entitled to pay as a commissioned officer from June 27, 1913, the effective date of his promotion to chief warrant grade fixed in the order of appointment. *Hooper's claim on that basis was disallowed by the Auditor for the Navy Department whose ruling was affirmed by the Comptroller of the Treasury on the ground that the Navy Department action promoting Hooper to commissioned grade effective in 1913 was not pursuant to law, etc.* (53 Ct. Cls. 374). Hooper then sued di-

rectly in the Court of Claims and, in *Hooper* v. *United States,* decided January 7, 1918, 53 Ct. Cls. 90, the court, upon a very full consideration, reached the same conclusion which the Auditor and Comptroller had reached and denied the claim. The Navy Department, still insisting Hooper was entitled to be paid as a commissioned officer from the date the Navy Department (Judge Advocate General) had decided upon, then asked the Court of Claims to take jurisdiction and decide the matter in accordance with the views of the Navy Department under the cited section 148 of the Judicial Code. This the court refused to do, on jurisdictional grounds.

The same rule has been recognized in cases in which suit has been brought on the bonds of disbursing officers of the United States for payments on account of which credit has been disallowed by the Government accounting officers: *Fidelity and Deposit Co. of Md.* v. *United States* (C.C.A. 4–1932), 55 F. (2d) 100; *United States* v. *Moore* (C.C.A. 2), 168 Fed. 36, 24 L.R.A. (N.S.) 309.

The rule was declared succinctly in an opinion (21 Op. Atty. Gen. 530, 531) rendered on May 6, 1897, by the then Attorney General Joseph McKenna to the Secretary of the Treasury. The Secretary of the Treasury had requested an opinion whether Samuel G. Fairchild was entitled to receive any pay under an appointment as special inspector of foreign steam vessels, in view of the sal-

ary he already was receiving under an appointment as local inspector of hulls. Attorney General McKenna refused to give his opinion on the question presented, stating in that connection as follows:

> *If a claim is presented the question of the legality of payment is one exclusively for the Comptroller, whose decision thereon is, by statute, made final as to all executive officers.* It has been repeatedly held by Attorneys General that on questions of disbursement of money or payment of claims, so by law relegated to the Comptroller, the Attorney General should not render opinions, especially in view of the fact that, if the matter is doubtful, it can be referred to the Court of Claims for authoritative decision. (Opinion of May 22, 1895, 21 Opin. 178; opinion of June 8, 1895, 21 Opin. 188), (Italics supplied).

This opinion of Attorney General McKenna was quoted and approved on September 13, 1899, by Attorney General Griggs (22 Op. Atty. Gen. 581), wherein the request of the Secretary of the Treasury for an opinion was refused. In requesting the Attorney General's opinion in a case somewhat analogous to the present case, the Secretary of the Treasury, under whom the Comptroller of the Treasury then was serving administratively, insisted that he was not and could not be bound by the decision of the Comptroller which theretofore had been rendered. He was informed by the At-

torney General that when a claim is presented, the question of legality of payment is one *exclusively* for the Comptroller whose decision, by statute, is made final as to *all executive officers.*

The opinion rendered to the Secretary of War on July 11, 1904, by Attorney General Moody (25 Op. Atty. Gen. 185) is particularly applicable to the present case for in that case the Secretary of War presented two questions, as follows:

> 1. Do officers of the Army on the retired list hold public office, and should the advancement authorized in the act of April 23, 1904 (vesting certain discretion in the President as to retirement of Army officers) be accomplished by an exercise of appointing power?
>
> 2. When a vacancy occurs, or is created by legislative enactment while the Senate is in session, can such vacancy be filled during a recess of the Senate, provided an act or thing is required by law to be done as a condition precedent to such exercise of the appointing power? In other words, must the date when the vacancy occurred, or was created, be alone considered in connection with the exercise of the appointing power, or must the statutes which require certain acts to be done, or which require an exercise of the Executive discretion, be also considered in determining whether a vacancy exists which may be filled by a recess appointment?

The Attorney General discussed these questions and gave his opinion thereon but then cited certain of the prior opinions of the Attorneys General, *supra,* quoting with approval the cited opinion of Attorney General McKenna, and stated:

> I proceed, however, to say that *the practical question underlying both your inquiries is whether upon the exercise of the executive discretion an officer advanced in rank and pay may be paid* at the advanced rate before the Senate has given its consent and advice. *It seems that this question was referred by you to the Comptroller of the Treasury upon a claim for the advanced pay in the account of a retired officer advanced under the statute, and was by him decided in the negative. Under section 8 of the Act of July 31, 1894 (28 Stat. 162, 208), the decision of the Comptroller upon any question involving the payment of money, duly referred to him, must govern in passing upon an account.* * * *
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> * * * here the Comptroller has already acted, and has rendered his decision upon due reference by you of the real question involved, in its practical aspect, and *this decision under the law must govern him in determining the matter whenever it is presented to him, in his function of passing upon accounts, unless, indeed, he himself should see fit to reconsider and revise or reverse his ruling.* (Italics supplied).

The opinion of August 10, 1922 (33 Op. Atty. Gen. 268), rendered by the Attorney General to the Secretary of the Navy also has particular and controlling application in the present case. The pertinent part of the decision is as follows:

> It appears that certain enlisted men in the Navy were tried by summary courts martial, ordered discharged, and sentences approved by the convening authority and carried into execution. Subsequently the matter was referred to you in due course, and you disapproved of the proceedings of the summary courts martial on the ground that they were illegal and without warrant of law, and you thereupon ordered the proceedings set aside. The enlisted men subsequently, in accordance with your decision, were brought back into the naval service, and were paid for the period between the time they were discharged under the sentences of the summary court martial and the time they returned to the service. When the disbursing officer's accounts containing these payments were submitted to the auditor for the Navy Department in due course, he disallowed these payments, and his action was affirmed by the Comptroller General. You applied to the Comptroller General for a reconsideration of the question, which was granted, but, upon reconsideration, the Comptroller General affirmed his previous decision.
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> * * * * *
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> From the above statement *it will be clearly seen that the actual question pending* before

you *is not as to your power to set aside the judgment of a summary court martial but as to the effect of the exercise of such power on the pay status of the enlisted man* during the period elapsing while the judgment of the summary court martial is in execution and before it has been set aside.

Section 8 of the Dockery Act of July 31, 1894 (ch. 174, 28 Stat. 207), provided that the balances certified by the auditors of the Treasury, or upon revision by the Comptroller of the Treasury, should be final and conclusive upon the executive branch of the Government, and that where disbursing officers, or the head of any executive department, applied to the Comptroller of the Treasury for his decision upon any question involving a payment, the decision, when rendered, should govern the case. Construing these provisions of law, my predecessors have uniformly held that a question of pay for the determination of the Comptroller cannot be submitted to the Attorney General for his opinion merely because it may incidentally involve some power or the effect of some power claimed to exist in the head of a department. (See, for example, 25 Op. 301, 28 Op. 129.) The same rule necessarily applies to the Comptroller General, in whom is vested all the power formerly conferred by law upon the Comptroller of the Treasury. (Act of June 10, 1921, ch. 18, sec. 304, 42 Stat. 20, 24.) (Italics supplied.)

It seems plain from the decided cases and the opinions of the Attorneys General that there is no authority vested by statute in the Chief of Finance to pay or to cause payment to be made by a bonded disbursing officer to the petitioner of the retired pay and allowances which the Comptroller General has decided are not authorized to be paid.

It would seem plain, also, there was no power in the Supreme Court of the District of Columbia, through its decree for mandatory injunction, to command the Chief of Finance, an unbonded subordinate in the War Department, to pay out public moneys. The exercise of such power by the court would disrupt the whole accounting for Government funds and is unsupported either by law or precedent.[9]

III

A decree in accordance with the prayers of the petitioner's bill would be contrary to law.

The decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act July 31, 1894, section 8, 28 Stat. 162, 207, following the provisions of the earlier act of March 30, 1868, 15 Stat. 54; section 304, act

[9] The petitioner's bill may be subject to dismissal also on the ground the Secretary of War, to whom the Chief of Finance is subordinate, is not named a party in the present proceeding for injunction which fact appears on the face of the record. *Webster* v. *Fall*, etc., et al., 266 U.S. 507.

June 10, 1921, 42 Stat., 24; *United States ex rel. Skinner & Eddy Corp.* v. *McCarl, etc.*, 275 U.S. 1, 4–5; In re Departmental Reference No. 167, 59 Ct. Cls. 813.

Such a decision is required to be rendered "without direction from any other officer." (Section 304, act June 10, 1921, 42 Stat. 24, 31 U.S.C. 44; Brief of the Comptroller General in Opposition to the petition herein, p. 31.)[10]

No Court may direct the decision of the Comptroller General to be rendered in a particular way. *James Howden & Co.* v. *Standard Shipbuilding Corporation* (CCA 2) 17 F. (2d) 530, 532; In re Departmental Reference No. 167, 59 Ct. Cls. 813; *Brumback* v. *Denman, etc.*, decided June 5, 1933, Law No. 3316, U.S. District Court for the Northern District of Ohio, Western Division, denying a motion filed therein in the nature of a mandamus to

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[10] Attorney General Roger B. Taney rendered an opinion to the President on April 5, 1832, 2 Op. Atty. Gen. 507, holding the rule then to be what the cited statute now specifically declares, the opinion being accurately summarized in the synopsis as follows:

"Where the account of General Taylor had been settled by the accounting officers, and a balance found against him, for which suit had been commenced; and a memorial

the Comptroller General of the United States. A copy of the latter opinion, which has not as yet been reported, is annexed as Appendix B, pp. 61–62.

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was subsequently presented by him to the President, requesting the discontinuance of the suit on account of alleged errors in the settlement, *held*, That the decision of the Comptroller was conclusive upon the executive branch of the Government; and that the President does not possess the power to enter into the correctness of the account for the purpose of repairing any errors which the accounting officers may have committed."

This opinion of Chief Justice Taney, while Attorney General, conforms with what Attorney General Wirt had held on references to him by the President. 1 Op. Atty. Gen. 624, 629; *id.* 636; *id.* 705, 706. President Jackson recognized these opinions of Attorneys General Wirt and Taney as stating the correct rule of law and on July 8, 1834, directed the Secretary of War to suspend further proceedings on the claim of General Parker which Attorneys General Berrien and Butler (2 Op. Atty. Gen. 302; *id.* 652) had held the Secretary of War might review and allow after it had been disallowed by the Second Comptroller. The entire history of the episode and the views of the several Presidents on the question involved are set forth in the opinion of Second Comptroller Hiland Hall of February 10, 1851, published pp. 510 to 533 of Volume I, Decisions of First Comptroller Lawrence.

Peebles and Graham, contractors for supplies in the Subsistence Department of the Army whose claim now is in the

A decree in accordance with the prayers of the petitioner's bill would be contrary also to section

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settled files of the General Accounting Office were found indebted by settlement of Third Auditor Peter Hagner on June 30, 1835, under their contract to supply beans and settlement was affirmed by the Second Comptroller. By endorsement of July 1, 1835, the War Department referred the contractors' protest to the President of the United States for his decision. The opinion of President Jackson, announced by the War Department to the contractor on July 3, 1835, is endorsed on the papers now on file, in President Jackson's own original autograph, as follows:

"Referred to the Secretary of War for his report of this case—and the rules of the Dept. in like cases.—A.J.

"The report made—Atts General opinion referred to—The President has no power over such cases—The decision of the second Comptroller is final, over whose decisions the President has no power except by removal. The Secretary of War will make this decision known to Mr. Peebles.—A.J." (Quoted incorrectly, Vol. I, Decisions of First Comptroller Lawrence, 523.)

Secretary of War, L. Cass, advised Peebles and Graham July 3, 1835, as follows:

"The report of the Commy Genl of Subsis., with the papers in relation to yr contract of * * [date illegible] Oct. '34, to furnish a quantity of beans for the Army of the U.S. has been submitted to the President. He is of opinion that they present a case, in which it is not proper for him to interfere. The decision of the 2d Compt is final, & must be so rec'd, unless Congress shall provide relief."

267 of the Judicial Code, act of March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384) which provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Aside from this controlling statute the rule declared is as old as the earliest period in the recorded history of English equity jurisprudence, and it is the general practice of courts of equity to dismiss a bill of complaint to recover realty, money, compensation, etc., if it be grounded merely on an alleged title: *Lewis* v. *Cocks,* 23 Wall. 466; *Killian* v. *Ebbinghaus,* 110 U.S. 568; *Litchfield* v. *Ballou,* 114 U.S. 190, 192; *Hurley* v. *Kincaid,* 285 U.S. 95, 104; *McKee* v. *Rudolph,* 56 App.D.C. 207, 12 F. (2d) 148, certiorari denied, 273 U.S. 710; *Parkersburg* v. *Brown,* 106 U.S. 487, 500.

In the cited case of *Hurley* v. *Kincaid,* decided *February 23, 1932,* 285 U.S. 95, 104, after both the District Court and the Fifth Circuit Court of Appeals seem to have disregarded the controlling force of this elementary rule in equity jurisprudence, and after a voluminous record had been built up, at great expense and effort on behalf of all parties, this Court reannounced this very plainly established rule, that equity could not entertain jurisdiction because there was an ample remedy at law, namely the right to recover compensation under the Tucker Act (24 Stat. 505) and that such remedy was plain, adequate, and complete.

In the more recent case of *Williams* v. *United States,* 289 U.S. 553, involving a claim of one of the judges of the United States Court of Claims for pay or compensation on the basis that he sat as a judge of a "constitutional" court, this Court (p. 560) said:

> Plaintiff is, and since November 11, 1929, has been, a judge of the Court of Claims of the United States. Since his entry upon the duties of his office, and until June 30, 1932, he received a salary at the rate of $12,500 per annum, as fixed by the Act of December 13, 1926, c. 6, § 1, 44 Stat. 919. Since that date he has been paid at the rate of $10,000 per annum under a ruling of the Comptroller General of the United States. Compare *O'Donoghue* v. *United States,* decided this day, *ante,* p. 516.
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> On February 8, 1933, this suit was brought in the Court of Claims to recover the amount of the difference between the statutory rate of $12,500, and the smaller amount paid under the ruling of the Comptroller General. The suit was brought by plaintiff in the court of which he is a member, *because,* as it is averred, *no other court or remedy was open to him.* * * * (Italics supplied.)

The reserving in the decisions by the Comptroller General of the doubtful questions involved for judicial decision in a direct proceeding against the United States, authorized under the

Tucker Act, neither in that case nor in the present case resulted to prejudice any legal status or right of the claimants. *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, 173–174; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Major Collins's Cases,* 14 *id.* 568 and 15 *id.,* 22. Such reservation by the Comptroller General of doubtful questions for judicial determination did operate, however, to properly conserve and protect the interests of the United States and the authority of the legislative branch over the public moneys. *Mullett* v. *United States,* 21 Ct. Cls. 485, distinguishing *McElrath* v. *United States,* 102 U.S. 426. Also, to make all interested parties secure from possible future litigation which would have been necessary had unauthorized payments been made by the disbursing officer. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *United States* v. *Keehler,* 9 Wall. 83; *Heidt* v. *United States,* 56 F. (2d) 559, certiorari denied, 287 U. S. 601; *Fidelity and Deposit Co. of Md.* v. *United States,* 55 F. (2d) 100; *United States* v. *Moore,* 168 F. 36, 24 L.R.A. (NS) 309; *United States* v. *Dempsey,* 104 F. 197.

As was said by Attorney General Mitchell in his letter to the Secretary of War of May 10, 1932 (p. 9, *supra*), concerning the nature of petitioner's present proceeding,

> A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as

> much a suit against the United States as if the United States were named a party. The officers named as defendants have no personal interest whatever in the controversy.

This Court has stated the rule in a number of cases that although the United States is not named a party the action is one against the United States where the individual respondents have no personal interest in the controversy, where the relief sought is against the named respondents only in their official capacity, and where the United States is "the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U.S. 443, 506; *Belknap* v. *Schild*, 161 U.S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387. The United States is an indispensable party if the action is one which may interfere with the performance of governmental functions and vitally affect interests of the United States.[11] *Morrison* v. *Work*, 266

[11] The Court will notice that petitioner has not presented his claim to the General Accounting Office or to the Comptroller General for direct settlement, which presentation would appear necessary to be shown as a condition to any relief by mandamus or injunction irrespective of other aspects of the case (*Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117); also that the now expeditious proceedings available under the Tucker Act in the Court of Claims where the merits might be passed upon have been deliberately avoided.

Had the proceedings been brought against the United States in the Court of Claims no officer or employee of, or person discharging any official function under, the United States might act as counsel, attorney, or agent for petitioner

U.S. 481, 485–486; *Lambert Co.* v. *Balto. & Ohio R.R. Co.*, 258 U.S. 377, 383; *Hopkins* v. *Clemson College*, 221 U.S. 636, 642–643; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68; *Belknap* v. *Schild*, 161 U.S. 10; *New York Guaranty Co.* v. *Steele*, 134 U.S. 230, 232.

A substantial right of the United States "cannot be tried behind its back" (*Louisiana* v. *Garfield*, 211 U.S. 70, 78) and the present proceeding fails under decisions of this Court by reason that the United States is not and cannot be made a party. *Louisiana* v. *McAdoo*, 234 U.S. 627, 628–629; *Goldberg* v. *Daniels*, 231 U.S. 218, 221–222.

The Court of Appeals in its decision of June 26, 1933, directing dismissal of the petitioner's bill of complaint has applied the decisions of this Court correctly. *Gaines* v. *Thompson*, 7 Wall. 347; *Work* v. *United States ex rel. Rives*, 267 U.S. 175.

The Court of Appeals also has applied its own decisions correctly. *Hurley* v. *Shanley* (1932) App.D.C., 60 F. (2d) 335; *McCarl* v. *Rogers*, 60 App.D.C. 111, 48 F. (2d) 1023; *McCarl* v. *U.S. ex rel. Leland*, 59 App.D.C. 362, 42 F. (2d) 346; *Mc-*

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or aid or assist in the prosecution or support of his claim, or directly or indirectly receive compensation therefor, by himself or another. Sections 109 and 113 Criminal Code, 18 U.S.C. 198 and 203; section 190 U.S. Revised Statutes, 5 U.S.C. 99; *Burton* v. *United States*, 202 U.S. 344; *Tyler's Motion*, 18 Ct. Cls. 25; *In re Winthrop*, 31 Ct. Cls. 35; *Case* v. *Helwig* (App.D.C.), 65 F. (2d) 186. Sound public policy may prevent that being done indirectly which may not be done directly.

Carl v. *Walters*, 59 App.D.C. 237, 38 F. (2d) 942; *U.S. ex rel. L. Margulies & Sons, Inc.*, v. *McCarl*, 56 App.D.C. 147, 10 F. (2d) 1012, certiorari denied, 273 U.S. 696; *Lochren* v. *Long*, 6 App.D.C. 486; *Seymour* v. *South Carolina*, 2 App.D.C. 240.

CONCLUSION

It is submitted that looking at the proofs none of the matters appear which would make a proper case for equity and on its own motion, just as the Court of Appeals for the District of Columbia has done, this Court might direct the dismissal of the petitioner's bill for injunction. *Allen* v. *Pullman's Palace Car Co.*, 139 U.S. 658, 662; *Nalle* v. *Oyster*, 230 U.S. 165; *Nat. Sav. & T. Co.* v. *Ryan*, 49 App.D.C. 159, 262 Fed. 613.

It is further submitted that the opinion and judgment of the Court of Appeals of the District of Columbia should be affirmed.

Respectfully submitted.

R. L. GOLZÉ, *General Counsel*,

HARRELL O. HOAGLAND,

Principal Attorney,
General Accounting Office.
(For the Comptroller
General of the United States.)

JANUARY 1934.

APPENDIX A

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5945

J. RAYMOND McCARL, COMPTROLLER GENERAL OF THE UNITED STATES AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY, APPELLANTS

v.

JOHN H. HOEPPEL, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Argued November 6, 1933. Decided December 18, 1933

Leo A. Rover, United States attorney, *John W. Fihelly,* assistant United States attorney, and *O. R. McGuire,* all of Washington, D.C., for appellants.

Burr Tracy Ansell and *Samuel T. Ansell,* both of Washington, D.C., for appellee.

Before Martin, Chief Justice, and Robb, Hitz, and Groner, Associate Justices.

ROBB, *Associate Justice:* Appeal from a decree in the Supreme Court of the District overruling appellants' motions to dismiss the bill and (appellants electing to stand on their motions) restraining appellant McCarl, the Comptroller General, from doing anything "to prevent the payment to the plaintiff (appellee) of his retired pay and allow-

ances *without application thereto of any reduction provided by section 106 of the Economy Act of June 30, 1932* (ch. 314, 47 Stat. 382, 401)" from July 1932 to March 3, 1933, inclusive, and commanding appellant Coleman to make such payments. (Italics ours.)

Appellee served honorably in the Regular Army as an enlisted man from July 27, 1898, to February 8, 1918, when he was appointed a commissioned officer. He served as such officer until October 30, 1919, when he was honorably discharged of his commission and resumed service as an enlisted man, in which capacity he served until August 16, 1921, when he was placed on the enlisted men's retired list of the Regular Army with the rank of master sergeant.

Under the provisions of the Economy Act of June 30, 1932 (ch. 314, 47 Stat. 382, 401), the retired pay of warrant officers of the Army (receiving more than $1,000 per annum) was subject to 8⅓-percent deduction (sec. 106). The retired pay of an enlisted man, not then being subject to deduction, was in excess of the pay of retired warrant officers under the Economy Act.

Section 106 of the Economy Act (ch. 314, 47 Stat. 382, 401) provides, *inter alia,* "that the retired pay of all commissioned and other personnel (except enlisted) of the Army, Navy, * * * shall be reduced as follows: * * *."

The Comptroller General ruled that under this provision the pay of retired warrant officers was subject to the economy deduction and that retired enlisted men who were entitled to the pay of retired warrant officers could be paid no more than was currently payable to such officers.

Appellee contended, and the court below sustained his contention, that he was entitled to the pay of a retired warrant officer and that because he was a retired enlisted man he was not subject to the economy deduction applicable to a warrant officer.

But section 111 of the Economy Act provides: "No court of the United States shall have jurisdiction of any suit against the United States or (unless brought by the United States) against any officer, agency, or instrumentality of the United States arising out of the application of any provision of this title, unless such suit involves the Constitution of the United States."

Since Congress may increase or decrease at will the pay of retired officers and men of the Army (*Wood* v. *United States*, 107 U.S. 414), it is plain that the present suit does not involve the Constitution of the United States. It is equally plain, we think, that the suit does arise out of the application of a provision of the Economy Act, namely, section 106 of that act. The Comptroller General has placed one interpretation upon a provision of that section and the court below has placed another, but section 111 of the act expressly withheld jurisdiction from the court in a case involving the application of such a provision.

Therefore, without considering other contentions, we reverse the decree and remand the cause, with directions to dismiss the bill.

Reversed and remanded.

A true copy.
Teste:

_____,
Clerk D.C. Court of Appeals.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Law, No. 3316

ORVILLE S. BRUMBACK, PLAINTIFF

vs.

ULYSSES G. DENMAN, ADMINISTRATOR UNDER WILL OF CHARLES S. NAUTS, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE TENTH DISTRICT OF OHIO

Memorandum Opinion

Plaintiff has filed a motion herein in the nature of a mandamus to the Comptroller General of the United States. I think the motion must be denied.

The Comptroller General of the United States has never been a party to this action and this court has no jurisdiction of his person. If the court had such jurisdiction, it would still be doubtful whether the court would have jurisdiction in a case which would amount to an original case of mandamus against a public officer. (Sec. 716, R.S., as reenacted, Sec. 262, Judicial Code; *Covington Bridge Co.* v. *Hager,* 203 U.S. 109, 110; *Emerson* v. *Baker,* 3 F. (2d) 830, 831; *Barber* v. *Hetfield* (C.C.A. 9) 4 F. (2d) 245, reversing *Hetfield* v. *Barber,* 2 F. (2d) 723; *Winifred E. Scanlan as Administratrix of Patrick J. Scanlan* v. *William E. Hurley, Postmaster at Boston, Mass.,* and *J. Raymond McCarl, Comptroller General of the United States,* United

States District Court for the District of Massachusetts—original petition for mandamus dismissed by District Judge Lowell on February 7, 1933—amended petition dismissed April 14, 1933.)

It is also doubtful whether any court outside of the District of Columbia may issue a writ of mandamus against an officer of the United States. (*Kendall, Postmaster General of the United States* v. *United States, ex rel. Stokes et al.*, 37 U.S. (12 Pet.) 524, 614, 623; concurring opinion of Associate Justice Catron in *United States ex rel. Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 520; *James Howden & Co.* v. *Standard Shipbuilding Corp.* (C.C.A. 2), 17 F. (2d) 530, 532.)

And again, there being a dispute between the plaintiff and the accounting officers of the government, it seems to be the generally accepted rule that mandamus will not lie even in the courts of the District of Columbia to compel the settlement to be made in a particular way or to compel payment contrary to the settlement or decision of the government accounting officers. (*Brashear* v. *Mason*, 47 U.S. (6 How.) 92, 100; *United States ex rel. Goodrich* v. *Guthrie*, 58 U.S. (17 How.) 284; *United States* v. *Lynch* (137 U.S. 280).) See also *James Howden & Co.* v. *Standard Shipbuilding Corp.*, 17 F. (2d) 530 (C.C.A. 2); and *Barber* v. *Hetfield* (C.C.A. 9), 4 F. (2d) 245.

The plaintiff's motion must be denied, with exceptions. An order may be entered accordingly.

(Signed) GEO. P. HAHN,
District Judge.

TOLEDO, OHIO, *June 5, 1933.*

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 435.—October Term, 1933.

Santos Miguel, Petitioner,
vs.
J. Raymond McCarl, Comptroller General of the United States, and Frederick W. Coleman, Chief of Finance, United States Army.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[March 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The petitioner served as an enlisted man in the Philippine Scouts under successive enlistments from October 1, 1901, until October 31, 1931, at which time, upon proper application, he was, by order of the Secretary of War acting for the President, placed on the retired list of the army with the rank of master sergeant in pursuance of the Act of March 2, 1907, c. 2515, 34 Stat. 1217, which provides:

"When an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, . . ."

A voucher for the retired pay and allowances for the month of November, 1931, was presented to the army disbursing officer for Manila, who, without making payment, forwarded it to the Comptroller General through the respondent Coleman, Chief of Finance, with a request for "an advance decision as to the legal authority for payment." The Comptroller General, on January 19, 1932, rendered a decision holding that "the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and advising the disbursing officer that he was not authorized to pay the voucher, which would be retained in the files of the office of the Comptroller General.

Petitioner thereupon brought this suit in the Supreme Court of the District of Columbia to enjoin the Comptroller General from interfering with the respondent Coleman, Chief of Finance, or with any finance or disbursing officer of the army, to prevent payment to petitioner of the retired pay and allowances due for the month of November and subsequent months; and to enjoin and command the Comptroller General to return forthwith to the disbursing officer the voucher then being retained in the files of his office. The bill further sought to enjoin and command respondent Coleman, Chief of Finance, to pay or cause to be paid to petitioner such retired pay and allowances for November and subsequent months. Motions of respondents to dismiss the bill were denied by the supreme court of the District, and thereupon respondents filed separate answers. A motion to strike these answers and for a decree in favor of petitioner was granted by the supreme court of the District. Final decree against respondents followed in accordance with the prayer of the bill.

Upon appeal to the court of appeals of the District, this decree was reversed and the cause remanded to the supreme court of the District with instructions to dismiss the bill. 66 F. (2d) 564. The holding of that court rested upon the view that mandamus would not lie against the Comptroller General to determine the right of a retired member of the Philippine Scouts to receive retirement pay and allowances, because the question of his status was disputed in good faith on the merits; and that neither mandamus nor injunction should issue "in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion."

No appearance is made here by respondent Coleman, and no brief filed or argument made in his behalf. The Solicitor General, however, has filed a comprehensive brief (in which the Judge Advocate General of the War Department joins) urging the correctness of the petitioner's contention and uniting with him in challenging the decision below. The Comptroller General, contending that the decision is right and should be affirmed, states the point of inquiry to be whether the Chief of Finance and the Comptroller General can be compelled by mandatory injunction, the one to pay or cause to be paid the voucher in question, and the other to

approve and allow credit for such payment, after the latter, on application for a decision by the disbursing officer before whom the voucher was pending for payment, has rendered his decision holding such payment not authorized under existing appropriations.

The principal question upon which the case turns, and the only one we need consider, is whether the statutes involved so plainly require the payment of the voucher that such payment constitutes a mere ministerial act on the part of the disbursing officer. Following numerous cases theretofore decided, the applicable rule in respect of the writ of mandamus is stated in *Wilbur* v. *United States*, 281 U. S. 206, 218-219, as follows:

"Mandamus is employed to compel the performance, when refused, of a ministerial duty; this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In *Roberts, Treasurer*, v. *United States*, 176 U. S. 221, this court held that where the proper construction of a statute is clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus. The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. "But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed

to him, and which, upon the facts exist[illegible]he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired." This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane* v. *Hoglund*, 244 U. S. 174, 181; *Wilbur* v. *Krushnic*, 280 U. S. 306, 318. The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations. *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 31, 33. With the foregoing well settled rule in mind we turn to the pertinent legislation.

Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorizes the President, when in his opinion conditions in the Philippine Islands justify such action, "to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army."

Petitioner enlisted under this act, and it does not admit of doubt that thereby he enlisted "for service in the Army" as a member of the organization of Philippine Scouts. One who enlists for service in the army certainly becomes "an enlisted man . . . in the Army"; and when he "shall have served thirty years" therein, he falls within the plain terms of the Act of March 2, 1907, *supra*, and, in accordance therewith, is entitled to "be placed upon the retired list" with the pay and allowances therein prescribed. Statutory provisions so clear and precise do not require construction. In such case, as this court has often held, the language is conclusive. "There can be no construction where there is nothing to construe." *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, 83, and cases cited.

The court below cites § 26 of the National Defense Act of June 3, 1916, 39 Stat. 166, 185; §§ 22 and 26 of the Act of June 4, 1920, 41 Stat. 759, 770, 775; and § 17 of the Act of June 10, 1922, 42 Stat. 625, 632, in support of its view that this is a case of "doubtful inference from statutes of uncertain meaning" in the sense of the rule stated in *Wilbur* v. *United States*, *supra*, hereinbefore quoted. But those sections fail, in our opinion, to disclose any-

thing which conflicts with the positive words of § 36 of the Act of 1901, *supra*. Section 26 of the 1916 act simply provides that captains and lieutenants of the Philippine Scouts who are citizens of the United States shall be entitled to retirement under the laws governing retirement of enlisted men of the regular army, but to be retired with the grade held by them at the date of their retirement. The section is confined to the officers named and has nothing to do with enlisted men. The provision was necessary, as pointed out in the brief of the Solicitor General, because prior to the enactment of the Act of June 4, 1920, *supra*, these officers were usually enlisted men of other branches of the regular army, whose appointments were of a provisional character. Special legislation was therefore required to enable them to retire with the pay and allowances of officers instead of enlisted men. The provisions in the Act of June 4, 1920, which are referred to, relate to "all officers of the Philippine Scouts," but it is expressly provided that nothing in the act shall alter the status of enlisted men. Section 17 of the Act of June 10, 1922, likewise relates to officers and former officers of the Philippine Scouts, according them the status of officers in the regular establishment; and again it is provided that the act shall not be construed as affecting the enlisted men.

It is hard to see how it reasonably can be thought that these acts have any effect upon the status of the enlisted men, since they are limited, in express terms, to officers. They do not modify or purport to modify in any way the provisions of § 36 of the Act of 1901 in respect of such enlisted men. If that conclusion were not clear, the provisos would effectually settle the doubt. Putting aside those acts, therefore, as irrelevant, we have only to consider § 36 of the Act of 1901, which plainly establishes the status of petitioner as an enlisted man in the army, and the Act of March 2, 1907, which just as plainly directs that such an enlisted man, having served thirty years as such, shall be placed upon the retired list. In this situation the duty of the disbursing officer to pay the voucher in question "is so plainly prescribed as to be free from doubt and equivalent to a positive command," and, therefore, is "so far ministerial that its performance may be compelled by mandamus." *Wilbur* v. *United States*, *supra*, pp. 218-219. It seems unnecessary to add that this duty cannot be affected by a contrary decision of the Comptroller General.

It is said by the Comptroller General that there was no existing appropriation of public money available for payment of retired pay and allowances to petitioner. But this statement quite evidently is made only in the view that the petitioner does not come within the retirement provision of the Act of March 2, 1907, since there was available an existing appropriation for retired pay and allowances of enlisted men retired under that provision.

The Chief of Finance is charged by law with the duty of disbursing all funds of the War Department, including the pay of the army. U. S. C., Title 10, § 172. The disbursing officer to whom the voucher was presented for payment, therefore, is simply a subordinate of the Chief of Finance, subject to his control and direction, and the suit was properly brought against the latter. The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. The disbursing officer as the mere agent of his superior officer is not an indispensable, although he might have been joined as a proper, party. Compare *Warner Valley Stock Company* v. *Smith, supra*, pp. 34-35; *Gnerich* v. *Rutter*, 265 U. S. 388, 391-393; *Webster* v. *Fall*, 266 U. S. 507; *Alcohol Warehouse Corporation* v. *Canfield*, 11 F. (2d) 214; *Dami* v. *Canfield*, 5 F. (2d) 533. We find no merit in the contention that the United States is a necessary party and this suit not maintainable without its consent, *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238; or in the further contention that the suit cannot be maintained because petitioner has a remedy at law in the court of claims for his retired pay. *Smith* v. *Jackson*, 246 U. S. 388; 241 Fed. 747, 760.

It follows that the decree of the court below, in so far as it directs a dismissal of the bill as against the respondent Coleman, must be reversed, and the decree of the supreme court of the District in respect of that respondent affirmed.

As to the Comptroller General, a different situation is presented. The request for an advance decision from him came from the Chief of Finance at the request of the disbursing officer. U. S. C. (Supp.), Title 31, § 74. The Comptroller General undertook nothing on his own motion, and, as he asserts, did nothing either to coerce or invite the application for an advance decision. Having given that decision, his function in that regard ceased. The effect of the decision is a matter purely of law. Obviously,

there is no occasion for compelling him by mandamus to recall his decision. However, he continues to retain possession of the voucher, upon the theory evidently that having determined that the disbursing officers were without authority to make payment, it belongs in the files of his office. The view of the supreme court of the District, that a mandatory injunction will lie to compel a return of that voucher to the disbursing officer and to enjoin the Comptroller General from any interference with the Chief of Finance tending to prevent payment thereof to petitioner, has not, in the light of the case as now made, met with the concurrence of a majority of this court. In that situation, we, therefore, affirm, without discussion, the decree of the District court of appeals in so far as it relates to the Comptroller General. But it is not to be supposed that, upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in any way with its payment.

The decree of the court below will accordingly be reversed as to the respondent Coleman, and affirmed as to the Comptroller General. But, in accordance with precedent, *Wilbur* v. *Krushnic*, *supra*, p. 319, the mandatory injunction to Coleman should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Comptroller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes. A writ in that form is better suited to the circumstances than that indicated by the supreme court of the District.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.